No. 95-1608-CFX

Title: Michele L. Timmons, Acting Director, Ramsey County Department of Property Records and Revenue, et al., Petitioners
v.
Twin Cities Area New Party

Docketed:
April 5, 1996

Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Apr 4 1996	Petition for writ of certiorari filed. (Response due May 5, 1996)
	Apr 26 1996	Brief of respondent Twin Cities Area New Party in opposition filed.
	May 8 1996	DISTRIBUTED. May 24, 1996
	May 28 1996	Petition GRANTED. SET FOR ARGUMENT December 4, 1996. **********
	Jun 10 1996	Application (A95-1014) for a stay of the enforcement of the judgment pending the issuance of the mandate of this Court, submitted to Justice Thomas.
	Jun 13 1996	Response to application (A95-1014) filed by Twin Cities Area New Party.
	Jun 14 1996	Application (A95-1014) referred to the Court by Justice Thomas.
	Jun 18 1996	Application (A95-1014) denied by the Court.
	Jul 2 1996	Order extending time to file brief of petitioner on the merits until July 19, 1996.
	Jul 19 1996	Brief of petitioners Lou McKenna, Director, et al. filed.
	Jul 19 1996	Joint appendix filed.
	Aug 13 1996	Order extending time to file brief of respondent on the merits until August 30, 1996.
	Aug 16 1996	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Aug 19 1996	Brief amicus curiae of Republican National Committee filed.
	Aug 20 1996	Record filed.
	Aug 20 1996	Record filed.
	Aug 30 1996	Brief amici curiae of Twelve University Professors, et al. filed.
	Aug 30 1996	Brief of respondent Twin Cities Area New Party filed.
	Aug 30 1996	Brief amici curiae of The Reform Party, et al. filed.
	Aug 30 1996	Brief amici curiae of Conservative Party of New York, et al. filed.
	Sep 3 1996	Lodging consisting of ten bound copies of material submitted by counsel for amici Conservative Party of New York
	Oct 3 1996	Reply brief of petitioners Lou McKenna, Director, et al. filed.
	Oct 18 1996	CIRCULATED.
	Dec 4 1996	ARGUED.

(1) 95-1608

No. _____

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

PETER M. ACKERBERG
Assistant Attorney General
Counsel of Record

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Telephone: (612) 282-5717

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Can a state constitutionally prohibit a candidate from filing for elective office under the banner of more than one political party?

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-11, *infra*) is reported at 73 F.3d 196. The opinion of the district court (App. 12-25, *infra*) is reported at 863 F. Supp. 988.

JURISDICTION

The court of appeals entered its judgment on January 5, 1996 (App. 1, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

U.S. Const. amend XIV, § 1 provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 204B.04, subd. 2 (1994) provides:

> No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.12, subdivision 4.

Minn. Stat. § 204B.06, subd. 1(b) (1994) provides:

> An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:
>
> . . .
>
> (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election . . . .

STATEMENT OF THE CASE

Respondent Twin Cities Area New Party ("New Party"), a minor political party under Minnesota law, sued petitioners[1] ("State") in August 1994 in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28

[1] Petitioners McKenna and Growe are county and State election officials, respectively. Petitioners' Appendix ("App.") at 3.

U.S.C. §§ 1331 and 1343(a)(3) and (4). Petitioners' Appendix ("App.") at 27.

The New Party decided to nominate incumbent Rep. Andy Dawkins as its candidate for a seat in the Minnesota House of Representatives. App. 28. However, Rep. Dawkins was also an unopposed legislative candidate for the same House seat in the primary election of the Minnesota Democratic-Farmer-Labor Party ("DFL"), one of the State's major parties. App. 27-28.[2] He was thus assured of being the DFL nominee. App. 2.

Candidates for election may not appear on the election ballot more than once. Minn. Stat. §§ 204B.04, subd. 2 and 204B.06, subd. 1(b) (1994); App. 34. Accordingly, election officials rejected the New Party's attempt to place Rep. Dawkins, who had previously filed as a candidate for the DFL nomination, on the general-election ballot as the New Party nominee. App. 2. The question presented here is whether the Constitution requires states to permit cross-filing or multiple party nominations.[3]

[2] A major political party is one that has evidenced significant voter support. *See* Minn. Stat. § 200.02, subd. 7 (1994) (setting forth voting and petition requirements for major-party status). Major parties are required, among other things, to conduct primary elections to nominate their candidates. Minn. Stat. § 204D.05 (1994).

[3] The 1996 Minnesota Legislature recently approved a bill permitting defined minor political parties to cross-file only if the Eighth Circuit decision is not reversed or stayed or if the court's mandate is not recalled. Minnesota Senate File No. 2720, § 10 (presented to Governor on March 30, 1996); App. 35. Legislation such as Senate File 2720, enacted only for the purpose of interim compliance with a court's judgment, does not moot an appeal. *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977).

The district court granted the State's summary judgment motion, relying in part on *Swamp v. Kennedy*, 950 F.2d 383 (upholding Wisconsin ban on cross-filing), *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992). App. 21-22, 25. It first rejected the State's argument that resolution of the case is governed by *Storer v. Brown*, 415 U.S. 724 (1974). App. 18. The district court characterized *Storer* as a challenge to a "sore loser" statute designed to prevent intra-party squabbles from being waged by self-described "independents" in the general election. App. 19. In contrast, Rep. Dawkins was not a sore loser but rather a "willing participant" in an effort to be nominated by both the DFL and the New Party, the district court asserted. *Id.*

Instead of relying on *Storer*, the district court reviewed the State's cross-filing ban under the three-part legal analysis set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). App. 16-17. First, in considering the "character and magnitude" of the restriction, the district court concluded that prohibiting cross-filing is not a "severe" restriction but a "minimal burden" on the New Party's First Amendment rights. App. 21, 23. The district court noted that the cross-filing ban does not prevent the New Party from nominating a candidate. App. 20. Instead, the ban, by preventing cross-filing, merely prevented New Party followers from "hitching their political cart to another party's star." App. 21.

The court then addressed the second part of the *Anderson* test by identifying and evaluating the precise interests advanced by the State for the restriction. App. 21-23. It found the State's interest in avoiding voter confusion and seating candidates who win at least a plurality

of votes in the general election as one party's nominee to be compelling. *Id.* The court concluded that the appearance of a candidate's name more than once under different party labels will result in voter confusion and create unequal treatment of candidates. App. 22.

The district court then engaged in the final step of the *Anderson* analysis by weighing the minimal burden imposed by the cross-filing ban on the New Party's First Amendment rights against the compelling interests advanced by the State for the ban. App. 23-25. It concluded that the cross-filing ban "is a valid and non discriminatory regulation of the electoral process," App. 23, and would be upheld even under the "stricter scrutiny" required of election statutes that, unlike those at issue, exclude a party or candidate from the ballot. App. 24. The mechanics of choosing candidates and counting votes is best left to legislative determination, the court added. App. 24-25.

The court of appeals reversed the district court after analyzing the ban on cross-nominations under the standards set forth in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). App. 5. It held that the cross-filing ban imposes a "severe" burden on the New Party's associational rights "because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." App. 6. The cross-filing ban was characterized as hindering the New Party's effort to establish itself as a "durable, influential player in the political arena" by forcing it "to make a no-win choice. In the absence of cross-filing, New Party

members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all." *Id.*

The State's ban on cross-filing "is broader than necessary to serve the State's interests . . . ," the court of appeals asserted. *Id.* The State's concern with major party splintering is curable by requiring the major party's consent for multiple nominations, and its concern with voter confusion can be remedied by simple ballot instructions, according to the court of appeals. App. 7-8. The remaining State concerns – the potential problem of overcrowded ballots and uncertainty about how to determine the winning candidate – were dismissed as "simply unjustified." App. 9. The State's concern with ballot overcrowding is sufficiently satisfied by statutory requirements for demonstrating minimal support before a candidate is placed on the ballot, the court of appeals stated. *Id.* In addition, the State's concern with counting ballots to determine the winning candidate is not advanced by banning multiple-party nominations, the court concluded. *Id.* The court of appeals found nothing remarkable about aggregating votes cast for a candidate appearing on the ballot as the nominee of more than one political party. *Id.*

The court acknowledged that its decision conflicts with *Swamp v. Kennedy,* 950 F.2d 383 (7th Cir. 1991) (upholding Wisconsin cross-filing ban), *cert. denied,* 112 S. Ct. 2992 (1992); App. 10. It noted that the *Swamp* court did not decide whether Wisconsin's law could have been more narrowly tailored. *Id.*

REASONS FOR GRANTING THE PETITION

The resolution by the Eighth Circuit of the question presented directly conflicts with the Seventh Circuit's *Swamp* decision, thereby creating a split in the circuits. In addition, the decision below casts doubt on the validity of election laws in 40 states that directly or indirectly ban cross-nominations. Finally, the decision below is erroneous.

I. The Decision Of The Eighth Circuit Directly Conflicts With The Decision Of The Seventh Circuit And Decisions Of State Courts.

The decision below directly conflicts with the Seventh Circuit decision in *Swamp v. Kennedy,* 950 F.2d 383 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 2992 (1992).

The Seventh Circuit in *Swamp* considered a constitutional challenge by the Labor-Farm Party ("LFP") to "Wisconsin's statutory ban on 'multiple-party nominations,' which prohibits a candidate from being nominated by more than one party for the same office in the same election." 950 F.2d at 384. The LFP, like the New Party here, sought to nominate a candidate who filed in the primary election of an established party. *Id.* In contrast to the ruling of the Eighth Circuit, the court in *Swamp* unanimously upheld the state law in two separate opinions based on different rationales.

Two of the three judges on the Seventh Circuit panel assessed the constitutionality of the ban on cross-filing under the *Eu* standards. *Swamp,* 950 F.2d at 385. The majority noted that the ban merely denied the LFP the

right to nominate "a candidate who has previously been placed on the primary ballot of another party." *Id.* Because the LFP could "nominate any candidate that the party can convince to be *its* candidate," the restriction was not considered to be a "substantial burden" on the LFP's opportunity for political advancement. *Id.* (emphasis in original). In short, "[t]he Labor-Farm Party has no right to associate with a candidate who has chosen to associate with another party." *Id.*

The *Swamp* majority rejected the LFP's argument, embraced in this case by the Eighth Circuit, that the ban hinders the efforts of third parties to compete by preventing coalitions with other parties. *Id.; New Party,* App. 6. Instead, the *Swamp* majority concluded that "[a]llowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to choose their own candidates promotes competition." *Swamp,* 950 F.2d at 384 (footnote omitted). The court found that the cross-filing ban created no burden on the efforts of a minority party to publicize its views, broaden its base of support, support the nominee of another party or choose another candidate to express its views. *Id.* at 386.

Even if the restriction did burden the LFP's associational rights, the burden is justified by compelling state interests, the *Swamp* majority added. *Id.* In the absence of the ban, "serious confusion for voters" would result from the "unlimited number of minority parties [that] could nominate the candidate of a major party for the same office. . . . " *Id.* Voters could not easily distinguish between parties presenting the same candidate. *Id.*

The *Swamp* majority also found a compelling interest in "preserving the integrity of its election process" by preventing fraudulent candidacies, such as when an unpopular minority party nominates the candidate of a major party in order to encourage the major party's defeat. *Id.* The State's interest in maintaining a stable political system justifies a ban that "limits involuntary fusion of political parties." *Id.*[4]

In a concurring opinion, one judge on the three-judge *Swamp* panel found that this Court's decision in *Storer v. Brown,* 415 U.S. 724 (1974), compelled validation of Wisconsin's ban on cross-filing. *Swamp,* 950 F.2d at 388 (Fairchild, Sr. Cir. J., concurring). He rejected avoiding voter confusion and preserving the integrity of the election process as compelling interests advanced by the ban on cross-filing. *Id.* at 387. However, in *Storer,* the Court recognized the State's compelling interest in maintaining a stable political system, and "maintaining the distinct identity of parties can be viewed as one facet" of that interest, the concurring judge stated. *Swamp,* 950 F.2d at 388. It is at least "arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party . . . [and] the prohibition against cross-filing does

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[4] The *Swamp* majority noted the district court's recognition of the State's "legitimate interest" in assuring that a majority or at least a plurality primary candidate advance to the general election. 950 F.2d at 386. In the absence of a cross-nomination ban, a candidate running for multiple party nominations could lose each party primary despite obtaining an aggregated majority vote. *Id.*

advance that interest," the concurring judge concluded. *Id.* at 387-88.

The original panel judges denied a petition for rehearing. *Id.* at 388. The Seventh Circuit, by a 7-3 majority, denied a petition for rehearing *en banc*. *Id.* (Ripple, Posner and Easterbrook, JJ., dissenting). There was no *en banc* majority opinion. The *en banc* dissenters characterized the ban as a "broad and severe regulation," asserted that cross-filing increases opportunities for voters and parties "to be heard and for workable political alliances to be formed" and stated that the state's compelling interest in avoiding voter confusion could be advanced by less restrictive alternatives than a ban on cross-filing. *Id.* at 389.

Thus, the Eighth Circuit decision in the instant case striking down Minnesota's ban on multiple-party nominations is in direct conflict with the Seventh Circuit's decision to uphold Wisconsin's similar statute in *Swamp*. Moreover, the divergent panel and en banc opinions in *Swamp* demonstrate the potential for additional discordant decisions as this issue is inevitably litigated in other circuits.

In addition to creating a circuit split, the Eighth Circuit decision is at odds with state appellate court decisions on the validity of prohibiting cross-filing. *See, e.g., In re Street*, 451 A.2d 427, 432 (Pa. 1982) (requirement prohibiting nomination of candidate already on ballot imposes no unfair or unnecessary burden on minority party); *Ray v. State Election Board*, 422 N.E.2d 714, 722 n.12

(Ind. Ct. App. 1981) (state may prevent cross-filing under *Storer*).[5]

II. The Validity Of Cross-Filing Bans Raises An Important Question.

The validity of cross-filing bans raises an important question requiring resolution in light of the pervasiveness of such restrictions among the states, legal uncertainty created by the *New Party-Swamp* circuit split and the divergent *Swamp* opinions. The election laws of 40 states and the District of Columbia reportedly directly or indirectly ban cross-filing in federal and state elections. William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683, 685 n.14 (1995). It is inevitable, in light of the Eighth Circuit's departure from *Swamp* and state court decisions upholding cross-filing bans, that additional litigation on the question presented will ensue. There is an urgent need for this Court's guidance on the question in light of the uncertainty created by the Eighth Circuit's decision and the importance of clarity in planning for and conducting elections. Further percolation of the question presented through the appellate courts is undesirable. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (Supreme Court review in ballot-access cases "will have the effect simplifying future challenges, thus increasing the likelihood

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[5] *See also* William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683, 688-89 & n.37 (citing prior state court decisions upholding cross-filing bans).

that timely filed cases can be adjudicated before an election is held.").

III. The Decision Of The Court Of Appeals Is Erroneous.

A further reason to grant the petition is that the decision of the court of appeals conflicts with *Storer v. Brown*, 415 U.S. 724 (1974), and this Court's ballot access principles.

A. The Cross-Filing Ban Imposes A Reasonable, Nondiscriminatory Burden In Light Of *Storer*.

The ballot-access restrictions upheld in *Storer* are substantially more severe than a cross-filing ban. However, the court of appeals erred by virtually ignoring *Storer*.

In *Storer*, the challenged statute prohibited candidates from being nominated as independents in the general election, if affiliated with a qualified political party within one year prior to the primary election, thereby creating "an absolute bar to candidacy." *Storer*, 415 U.S. at 726, 737. Two of the *Storer* plaintiffs wanted to run for Congress in the 1972 general election as independents, but were barred because they were registered Democrats until January and March, 1972. *Id.* at 728. They challenged the disaffiliation statute on the grounds that it posed an unconstitutionally severe burden upon the right to vote and associate for political purposes under the First and Fourteenth Amendments. *Id.* at 729.

A ban on cross-filing is a reasonable nondiscriminatory restriction compared to the party disaffiliation statute applicable to independent candidates upheld in *Storer*. First, the disaffiliation statute challenged in *Storer*, when applied to parties, barred a minor party from nominating not only a current candidate of another party, but also anyone merely affiliated with any other party in the recent past.[6] It barred a minor party from considering thousands of possible candidates as potential nominees because they were registered members of the Democratic, Republican, or other parties. However, in this action, the challenged cross-filing ban bars the New Party from nominating only a handful of persons – Rep. Dawkins and any additional nominees of other parties for the same seat.

Second, the upheld disaffiliation statute, when applied to parties, required a minor party to begin its search for a candidate more than 17 months before the general election. *Storer*, 415 U.S. at 758 (Brennan, J., dissenting). Here, however, the New Party has until July of the election year to persuade a potential candidate affiliated with another party to be its candidate. Minn. Stat. § 204B.09, subd. 1 (1994) (filing period for nominating petitions).

Finally, the statute challenged in *Storer* operated as "an absolute ban to candidacy" for many potential candidates. *Storer*, 415 U.S. at 737. In contrast, the cross-filing ban here does not ban anyone from the ballot. It only bars

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[6] The challenged disaffiliation statute was part of a regulatory scheme that also required party candidates to disaffiliate. *Storer*, 415 U.S. at 733.

Rep. Dawkins or other party nominees from being listed as a candidate more than once. The Eighth Circuit did not suggest any basis for distinguishing between *Storer's* application of a disaffiliation requirement to an independent candidate and the application of a less restrictive cross-filing ban to the candidate of a minor party.

The *New Party* district court erroneously found *Storer* not dispositive because "the disaffiliation rule at issue in *Storer* was directed at 'sore losers' " and because Rep. Dawkins was not a sore loser, but "a willing participant." App. 19. However, the *Storer* plaintiffs were not "sore losers." They were simply Democratic Party members, rather than defeated Democratic Party primary participants. 415 U.S. at 728. If *Storer* only prevents sore loser candidates, it would not apply to the *Storer* plaintiffs. This Court has never questioned the continuing validity of *Storer*, nor given any indication that it intended *Storer* to apply only to the "sore loser" situation. Thus, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court recognized the validity of a disaffiliation statute which still permits an independent-minded group or a minor party to gain access to the ballot with some candidate. *Id.* at 719 n.12. *See also Burdick v. Takushi*, 112 S. Ct. 2059, 2063-67 (1992) (citing *Storer* in upholding Hawaii ban on write-in votes) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 n.13 (1986) (citing state interest upheld in *Storer*.)

The court of appeals erred, in light of *Storer*, by characterizing the ban on cross-filing as a "severe" restriction on the New Party's associational rights. *Storer* requires a holding that the State's cross-filing ban imposes only a reasonable, nondiscriminatory burden on the New Party's associational rights.

B. The State's Important Interests Are Advanced By Its Ban On Cross-Nominations.

The court of appeals, based on its erroneous "severe" characterization of the burden imposed on the New Party, would improperly require the State to adopt "less restrictive ways" to avoid the party splintering and voter confusion created by cross-filing. App. 7-8. However, the State is not required to achieve its important interests by the most narrow means when it imposes reasonable ballot access restrictions. "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' " on protected First and Fourteenth Amendment rights, " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 112 S. Ct. at 2063 (1992) (citation omitted). In this case, the State's important interests amply justify the ban on cross-filing.

The Court recognizes that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer*, 415 U.S. at 736. Cross-filing invites splintering and factionalism by making it possible for the various separate political interests that coalesce into a political party to separately demonstrate their individual voter appeal. Thus, for example, the pro-life, lower tax and fair minimum wage wings of a party may all separately nominate the party's nominee under appealing ballot slogans when cross-filing is permitted. This turns the general-election ballot into a forum for venting intraparty squabbles by creating competition among the various party interests. Such competition may properly be confined to the primary election. *See Storer*, 415 U.S. at 735 (recognizing legitimacy of state policy to

avoid making general election ballot "a forum for continuing intraparty feuds.").

The court of appeals suggested that factionalism could be avoided merely by requiring consent of the major party and its nominee before a minor party can nominate the candidate of a major party. App. 7. However, the State is not constitutionally required to enact a consent requirement. It may simply ban cross-filing because it does not impose a "severe" burden on the New Party's rights and is a regulation that reasonably promotes the State's important interest in minimizing factionalism.

The court of appeals also erred in suggesting that the State could avoid voter confusion caused by cross-filing by providing simple explanations in ballot directions. App. 8. This Court recognizes that the state has a compelling interest in avoiding voter confusion. *Storer*, 415 U.S. at 732; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The state has legitimate interests in fostering a simple ballot to avoid voter confusion. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986). Thus, the state has a compelling interest in presenting a simple ballot in which there is a one-to-one alignment between candidates and parties. *Cf. Packrall v. Quail*, 411 Pa. 555, 557, 192 A.2d 704, 706 (1963) (without state regulation, general election ballot may become "cluttered by candidates who are seeking to multiply the number of times their names appears on the ballot under various and inviting labels."). Simple ballot directions might or might not prevent voter confusion created by cross-filing. However,

> [t]o require States to prove actual voter confusion . . . as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshalled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro, 479 U.S. at 195-96.

The cross-filing ban is also justified by the State's interest in providing a fair and honest election process, even if its regulation interferes with internal party affairs. *Eu*, 489 U.S. at 231 (citing *Storer*, 415 U.S. at 730). The State's regulation prevents three types of fraudulent or improper manipulation of the ballot: 1) creation of new political parties simply to increase a candidate's access to the ballot; 2) "raiding" of vulnerable new major parties to gain short-term political advantage; and 3) nomination of a popular major party candidate by a minor party simply to gain the status of a major party.

First, as noted above, cross-filing enables a candidate to manipulate the ballot to his advantage by having his name placed on the ballot innumerable times under various appealing slogans masquerading as political parties. Second, cross-filing exposes a new but relatively weak major party to "raiding" by an established major party. An established major party may decide that it would be

to its advantage for its nominee to also appear on the ballot as the nominee of the Independence Party of Minnesota.[7] If the Independence Party is relatively small, supporters of the established major party candidate could outvote supporters of the Independence Party's "real" candidate in the Independence Party primary.

Finally, a minor party could use cross-filing solely to achieve status as a "major political party" without offering voters an additional candidate choice. A minor party can use cross-filing to nominate a popular major-party candidate. It is elevated to major-party if five percent of the electorate votes for that candidate on the ballot line of the minor party and the party gets votes in each county. Minn. Stat. § 200.02, subd. 7(a) (1994). By this method, cross-filing allows the former minor party to get a preferred place on the general election ballot in the next election for all of its candidates without having to submit nominating petitions. Minn. Stat. § 204D.13 (1994).

Each of the ballot manipulations described above is driven by the "short-range political goals" of candidates, their supporters, or political parties. The state has a legitimate interest in thwarting such goals when they conflict with the State's interest in assuring fair and honest elections and add nothing to electoral competition among

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[7] The Independence Party recently gained major party status in Minnesota. *See* Minn. Stat. § 200.02, subd. 7(a) (1994) (defining major party as party whose candidate obtains votes in each county and five percent of vote); Election Division, Secretary of State, The Minnesota Legislative Manual: 1995-1996 at p. 368-89 (n.d.) (showing Independence Party candidate for U.S. Senate received required vote distribution and percentage for major party status).

different candidates. *See Swamp*, 950 F.2d at 385 ("forcing parties to choose their own candidates promotes competition.").

C. The Ban On Cross-Filing Survives Heightened Scrutiny.

Even if the ban on cross-filing is subject to heightened scrutiny, as the court of appeals concluded, it is valid under *Storer*.

Three dissenting *Storer* justices criticized the opinion for failing to adequately examine whether "less drastic means" could have served the State's interests. *Id.* at 761 (Brennan, J., dissenting). In their view, the State's interests could be adequately served with less drastic means. *Id.* at 761-62. The less drastic means suggested by the *Storer* dissenters are incorporated in the cross-filing ban challenged here.

The first suggested less drastic means was to advance the 12-month date when disaffiliation must be effected to "significantly closer to the primaries." *Id.* at 762. Here, a minor party candidate formerly affiliated with a major party does not have to disaffiliate from the major party until the July filing period. *See* Minn. Stat. § 204B.09, subd. 1 (1994) (general election affidavits of candidacy and nominating petitions to be filed 56-70 days before primary). Thus, the disaffiliation requirement here is "significantly closer to the primaries" than it was in *Storer*.

The second less drastic means suggested by the *Storer* dissenters was to limit the disaffiliation requirement to

independent candidates "who actually run in a party primary." 415 U.S. at 762. The ban on cross-filing challenged here is so limited. Thus, the cross-filing ban would satisfy the "less drastic means" test required by the *Storer* dissenters. The Eighth Circuit erred in requiring additional narrowing.

CONCLUSION

In light of the circuit split on the presented question, the pervasiveness of state bans on cross-filing and the Eighth Circuit's error, the Court should grant this petition.

Dated: April, 1996

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

PETER M. ACKERBERG
Assistant Attorney General
Counsel of Record

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Telephone: (612) 282-5717

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3417MN

Twin Cities Area New Party, Appellant, v. Lou McKenna, Director, Ramsey County Department of Property Records and Revenue; Joan Anderson-Growe, Secretary of State, State of Minnesota, Appellees.	*	Appeal from the United States District Court for the District of Minnesota.

Submitted: May 18, 1995

Filed: January 5, 1996

Before RICHARD S. ARNOLD, Chief Judge, and WOOD* and FAGG, Circuit Judges.

FAGG, Circuit Judge.

* The HONORABLE HARLINGTON WOOD, JR., United States Circuit Judge for the Seventh Circuit, sitting by designation.

In this case, we must decide whether Minnesota can constitutionally prevent a minor political party from nominating its chosen candidate on the ground the candidate is another party's nominee, even though the candidate consents to the minor party's nomination and the other party does not object. *See* Minn. Stat. § 204B.06 subd. 1(b) (1994); *id.* § 204B.04 subd. 2.

The facts are undisputed. In April 1994, the Twin Cities Area New Party, a legitimate minor political party under Minnesota law, *see id.* § 200.02 subd. 7, voted to nominate Andy Dawkins, the incumbent Democratic-Farm-Labor (DFL) state representative in House District 65A, as the New Party's candidate for that office in the November 1994 general election. The New Party believed Dawkins would best represent and deliver the principles of the New Party's platform. Dawkins, who faced no opposition in the upcoming DFL primary election and was thus ensured the DFL nomination, accepted the New Party's nomination and signed an affidavit of candidacy for the New Party. *See id.* § 204B.06 (requiring all candidates to file affidavit of candidacy). The DFL did not object to the New Party's nomination of Dawkins. The New Party prepared a nominating petition with the required number of signatures. *Id.* § 204B.03 (providing for minor party nomination through nominating petitions rather than primaries); *see id.* § 204B.07; *id.* § 204B.08.

When the New Party attempted to file Dawkins's affidavit and the nominating petition, however, the Secretary of State's office rejected them because Dawkins had filed an affidavit of candidacy for the DFL party, a major political party in Minnesota. Thus, Dawkins's New Party affidavit did not state he had "no other affidavit on file as

a candidate . . . at the . . . next ensuing general election," as Minnesota law requires. *Id.* § 204B.06 subd. 1(b). Dawkins's candidacy on the New Party ticket was also prohibited under a Minnesota statute that provides, with exceptions inapplicable here, "No individual who seeks nomination for any partisan . . . office at a primary shall be nominated for the same office by nominating petition." *Id.* § 204B.04 subd. 2.

After the rejection of its nominating petition, the Twin Cities Area New Party brought this action challenging the laws preventing Dawkins's nomination, and the district court upheld the laws in granting summary judgment to Minnesota Secretary of State Joan Anderson-Growe, the official in charge of administering state elections, and Lou McKenna, a Minnesota county director in charge of county elections. *Twin Cities Area New Party v. McKenna,* 863 F. Supp. 988 (D. Minn. 1994). The New Party appeals.

Although the New Party's nomination of a candidate already nominated by a major political party may appear unconventional to many present-day voters, the practice dates back to nineteenth century politics. The practice, called "multiple party nomination" or "fusion," is the nomination by more than one political party of the same candidate for the same office in the same general election. William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties,* 95 Colum. L. Rev. 683, 687 (1995). A person who votes for a candidate nominated by multiple parties simply chooses between casting the vote on one party line or another. General election votes that the candidate receives on each party's line are added together to decide the overall winner. *Id.* Thus, as without

multiple party nomination, the person who receives the most votes wins the general election.

Multiple party nomination was widely practiced in state and national elections throughout the 1800s. Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 Am. Hist. Rev. 287, 288 (1980). Following the national emergence of a third party and its extensive fusion with a major party in the 1892 presidential campaign, the parties in power in state legislatures started to ban multiple party nomination in both state and national elections to squelch the threat posed by the opposition's combined voting force. *Id.* at 302. Minnesota and about ten other states enacted the bans around 1900. *Id.* By preventing multiple party nomination, the bans ended the importance and existence of significant third parties. *Id.* at 303.

Although multiple party nomination is prohibited today, either directly or indirectly, in about forty states and the District of Columbia, the practice is still permitted in ten states, including New York. Kirschner, 95 Colum. L. Rev. at 685 nn.13 & 14. Where multiple party nomination is allowed, the practice plays a significant role in modern elections. Many prominent national, state, and city leaders, including Ronald Reagan, John F. Kennedy, Franklin D. Roosevelt, Earl Warren and Fiorello LaGuardia, have won significant elections at least partially because they appeared on the general election ballot as the candidate for a minor party in addition to a major party. *Id.* at 683 & n.2. For example, in the 1980 presidential race in New York, Jimmy Carter received more votes as a Democrat than Ronald Reagan did as a

Republican, but Reagan's additional votes on the Conservative Party line allowed him to carry the state. *Id.*

The legal standards that control our review are well-settled. A state's broad power to regulate the time, place, and manner of elections does not eliminate the state's duty to observe its citizens' First Amendment rights to political association. *Eu v. San Francisco County Democratic Cent. Comm'n*, 489 U.S. 214, 222 (1989). To decide a state election law's constitutionality, we first consider whether it burdens First Amendment rights. *Id.* If so, the state must justify the law with a corresponding interest. See *id.* When the burden on First Amendment rights is severe, the state's interest must be compelling and the law must be narrowly tailored to serve the state's interest. *See id.*; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

Minnesota's statutes precluding multiple party nomination unquestionably burden the New Party's core associational rights. Political parties enjoy freedom "to select a 'standard bearer who best represents the party's ideologies and preferences.' " *Eu*, 489 U.S. at 224 (quoted case omitted). Parties have the right "to select their own candidate." *Id.* at 230 (quoting with approval *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 235-36 (1986) (Scalia, J., dissenting)). Parties also have an associational right to "broaden the base of public participation in and support for [their] activities." *Tashjian*, 479 U.S. at 214.

The burden on the New Party's associational rights is severe. The New Party cannot nominate its chosen candidate when the candidate has been nominated by another party despite having the candidate's and the other party's blessing. The State's simplistic view that the New Party

can just pick someone else does not lessen the burden on the New Party's right to nominate its candidate of choice. *See Norman*, 502 U.S. at 289 (law preventing group from using established political party's name with party's consent severely burdened group). As in *Norman*, the burden here is severe because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities. History shows that minor parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned. *See* Kirschner, 95 Colum. L. Rev. at 700-04. This is so because a party's ability to establish itself as a durable, influential player in the political arena depends on the ability to elect candidates to office. And the ability of minor parties to elect candidates depends on the parties' ability to form political alliances. When a minor party and a major party nominate the same candidate and the candidate is elected because of the votes cast on the minor party line, the minor party voters have sent an important message to the candidate and the major party, which gets attention for the minor party's platform. By foreclosing a consensual multiple party nomination, Minnesota's statutes force the New Party to make a no-win choice. New Party members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all.

Minnesota's ban on multiple party nomination is broader than necessary to serve the State's asserted interests, regardless of their importance. Minnesota asserts the

statutes are necessary because without them, minor party candidates would just ride the coattails of major party candidates, disrupting the two-party political system as we know it. Minnesota is concerned about internal discord within the two major parties and major party splintering. The New Party responds that to avoid these problems, Minnesota need only require the consent of the candidate and the candidate's party before the minor party can nominate the candidate. We agree. By merely rewriting the laws to require formal consent, Minnesota can address its concerns without suppressing the influence of small parties. *Norman*, 502 U.S. at 290. Minnesota has no authority to protect a major party from internal discord and splintering resulting from its own decision to allow a minor party to nominate the major party's candidate. *Tashjian*, 479 U.S. at 224. The "State . . . may not constitutionally substitute its own judgment for that of the [major] [p]arty." *Id.* Minnesota's interest in maintaining a stable political system simply does not give the State license to frustrate consensual political alliances. We realize "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," *Storer v. Brown*, 415 U.S. 724, 736 (1974), but Minnesota's concerns that all multiple party nominations would cause such ruin are misplaced. Indeed, rather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics. As James Madison observed, when the variety and number of political parties increases, the chance for oppression, factionalism, and nonskeptical acceptance

of ideas decreases. Kirschner, 95 Colum. L. Rev. at 712 n.213.

The State's concerns about voter confusion can also be dealt with in less restrictive ways. The State worries that voters would be confused at the polls by seeing a candidate's name on more than one party line. This confusion could be alleviated by simple explanations in the ballot directions to cast the ballot for the candidate on one party line or the other. The State also believes it would be difficult for the voters to understand where a candidate stands on issues when the candidate's name appears twice on a ballot, and voters will be misled by party labels. The State undoubtedly has a legitimate interest in " 'fostering informed and educated expressions of the popular will in a general election.' " *Tashjian*, 479 U.S. at 220 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983)). A consensual multiple party nomination informs voters rather than misleads them, however. If a major party and a minor party believe the same person is the best candidate and would best deliver on their platforms, multiple party nomination brings their political alliance into the open and helps the voters understand what the candidate stands for. *See Norman*, 502 U.S. at 290 (misrepresentation easily avoided by requiring established political party's formal consent to use of its name by like minded candidates).

The Supreme Court has recognized that party labels "provide a shorthand designation of the views of party candidates on matters of public concern, [and] the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise [to vote]." *Tashjian*, 479 U.S. at

220. For example, a candidate's ballot listing on the Right to Life Party ticket gives a voter more specific information about the candidate's views than a ballot listing on a major party ticket alone. Essentially, Minnesota suggests multiple party nomination would confuse voters by giving them more information. The Supreme Court teaches, however, that courts must skeptically view a state's claim that it is enhancing voters' ability to make wise decisions by restricting the flow of information to them. *Id.* at 221. Indeed, neither the record nor history reveal any evidence that multiple party nominations have ever caused any type of confusion among voters, in Minnesota or anywhere else. *See* Kirschner, 95 Colum. L. Rev. at 707-08 n.176.

The State's remaining concerns about multiple party nomination are simply unjustified in this case. The potential problem of overcrowded ballots is already avoided by requiring a candidate to display a minimum level of support before being placed on the ballot. *See* Minn. Stat. § 204B.08. The State's concern with "knowing how the winner will be determined" is not furthered by statutes preventing multiple party nomination in general elections. The winner is determined in the same way in general elections whether or not a fusion candidate is involved: the individual who receives the most votes wins. Electoral history shows there is nothing remarkable about awarding victory to a candidate who receives the most overall votes, just because the votes are cast on two lines rather than one. As noted earlier, this is how Ronald Reagan beat Jimmy Carter in the 1980 presidential race in New York.

On a final note, we recognize one federal court of appeals has addressed the constitutionality of laws preventing multiple party nomination. In *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992), two judges on a divided three-judge panel held Wisconsin's statutes banning multiple party nomination did not burden a minor political party's associational rights, and even if they did, the State's interests justified the burden. *Id.* at 386. The other panelist believed the party's rights were burdened and thought only the State's compelling interest in maintaining the distinct identities of the political parties justified the laws. *Id.* at 386-88 (Fairchild, J. concurring). On the denial of rehearing en banc, Judges Ripple, Posner, and Easterbrook dissented because they believed the panel had deviated from the Supreme Court's analysis in applying the controlling legal standards. *Id.* at 388-89. In any event, neither the majority nor the concurrence in *Swamp* decided whether Wisconsin's law could have been more narrowly tailored with a consent requirement.

We hold Minn. Stat. §§ 204B.06 subd. 1(b) & 204B.04 subd. 2 are unconstitutional because the statutes severely burden the New Party's associational rights and the statutes could be more narrowly tailored (with a consent requirement) to advance Minnesota's interests. We do not reach the constitutionality of Minn. Stat. § 204B.04 subd. 1, which states, "No individual shall be named on any ballot as the candidate of more than one major political

party," because it is not involved in this case. We reverse the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Twin Cities Area New Party,

Plaintiff,

vs.

Lou McKenna, Director, Ramsey County Department of Property Records and Revenue; Joan Anderson Growe, Secretary of of [sic] the State of Minnesota,

Defendants.

Civ. No. 3-94-953

AMENDED ORDER AND MEMORANDUM

(Filed Sept. 16, 1994)

Public Interest Project of Hamline Law School and Kenneth E. Tilsen, Public Citizen Litigation Group and Cornish F. Hitchcock and Davis, Miner, Barnhill & Galland and Sarah E. Siskind appeared for and on behalf of plaintiff.

Office of the Ramsey County Attorney and Kristine Legler Kaplan and Office of the Minnesota Attorney General and Peter M. Ackerberg appeared for and on behalf of defendants.

This matter came on for hearing before the Honorable Michael J. Davis on September 9, 1994 on plaintiff's motion for injunctive relief pursuant to Fed. R. Civ. P. 65. Pursuant to the agreement of the parties and upon the order of the court, Fed. R. Civ. P. 65(a)(2), the matter was consolidated and hearing was had on the merits pursuant to Fed.R.Civ.P. 56. For the reasons stated herein, the summary judgment is granted on behalf of Defendants.

I. FACTS

In April 1994 the Twin Cities Area New Party ("New Party"), a national political organization, convened a meeting at which party members voted to nominate incumbent Minnesota State Representative Andy Dawkins as the New Party candidate for District 65A in the Minnesota House of Representatives. Although Rep. Dawkins had already filed an Affidavit of Candidacy as the candidate of the Democratic-Farmer-Labor Party (DFL) for District 65A, he expressed a willingness to accept the New Party nomination in addition to the DFL nomination.

Since the New Party does not nominate candidates in a primary, it must file a nominating petition containing the signatures of ten percent of the persons eligible to vote in the District 65A, with a minimum of 500 valid signatures. Minn. Stat. §§ 204B.03, 204B.08, Subd. 3(c) (1992).

On July 18, 1994 New Party representatives presented to the Ramsey County Department of Property Records and Revenue a nominating petition in Rep. Dawkins' behalf containing some 600 signatures.[1] When the New Party representatives tried to file their petition, Supervisor of Elections and Voter Registration Joan M. Pelzer informed them that Rep. Dawkins had already filed an

[1] Under Minnesota law, petitions for offices in which voters from only one county will participate must be filed with the county auditor. Minn. Stat. § 204B.09, subd. 1 (1992).

Affidavit of Candidacy as the DFL candidate. Consequently, Ms. Pelzer, citing Minn. Stat. § 204B.06, subd. 1(b),[2] refused to accept the New Party's petition.

As Director of the Ramsey County Department of Property Records and Revenue, Lou McKenna is responsible for the administration of Minnesota's election law in Ramsey County. Minn. Stat. §§ 204B.09, subd. 1 and 200.02, subd. 16. As such, Mr. McKenna is named as the defendant in this action. As Secretary of the State of Minnesota, Joan Anderson Growe is responsible for the administration of Minnesota's election laws and is named as a party in this action.

On August 10, 1994 Plaintiff moved the court for a preliminary injunction, alleging, *inter alia*, that those portions of the Minnesota election statute which require a party candidate to disaffiliate himself from other parties upon the filing of an affidavit of candidacy or a nominating petition are unconstitutional. *See*, Minn. Stat. §§ 204B.03 (requiring candidates for partisan offices to be nominated by either primary election or nominating petition), 204B.04, Subds. 1 (prohibiting a candidate's name from appearing on the ballot of more than one major political party), and 2 (prohibiting primary election candidates from being nominated by petition), and 204B.06, Subd. 1(b) (1992) (requiring candidates filing affidavits of

[2] Section 204B.06, Subd. 1 provides that "An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

> (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuring general election. . . . "

candidacy to affirm that the candidate has filed no other affidavit of candidacy in the same primary or ensuing general election.) Defendants moved for summary judgment and plaintiffs agreed that the matter is ripe for summary judgment.

Plaintiff contends that the disaffiliation statutes infringe the associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution by prohibiting it from nominating as it's [sic] candidate the person chosen by the members.

The defendants argue that the net effect of the challenged statues [sic] is to assure that the name of the primary election winner appears only once on the general election ballot and it insures that primary election losers do not appear at all. These interests constitute the legitimate interests which justify the burden placed upon plaintiff's associational rights.

II. DISCUSSION

A.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over facts that might

affect the outcome of the lawsuit according to applicable substantive law are material. *Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49. In the instant case, the parties agree that there are no issues as to the material facts; this matter concerns a question of law which makes its resolution particularly susceptible to summary judgment.

B.

It is beyond question that the rights of the citizenry to voluntarily associate themselves for partisan political purposes is among the core values protected by the First and Fourteenth Amendments to the United State [sic] Constitution. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224, 109 S.Ct. 1013, 1020 (1989). All regulation of the election process is not, however, foreclosed by the protection afforded the electoral process by the Constitution. As the Supreme Court observed, "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974). The state has broad power to regulate the process of elections, but that power is limited by the strictures imposed by the First Amendment. *Tashjian v. Republic Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550 (1986).

The Supreme Court has set out the framework in which the constitutionality of state election laws is to be analyzed:

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the [c]ourt must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983) (Citations omitted.); *Eu*, 489 U.S. at 222, 109 S.Ct. at 1019-20. Moreover, "[t]o the degree that a State would thwart these [First and Fourteenth] interests by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 704 (1992) (Citations omitted.). However, that a state's system tends to limit the field of candidates from which the voters may choose is not dispositive of the question of the constitutionality of the statute. *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. 2059, 2063 (1992). Rather, the inquiry is focused on the "extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.*

With this background in mind, the court now turns to an examination of the interests of the New Party which

are purportedly burdened by the state's disaffiliation statutes and the interests advanced by the state in justification of the statutes.

C.

The New Party argues here that Minnesota's disaffiliation statute infringes upon its rights to select the candidate of its choice. There can be little doubt that at the core of the associational rights protected by the First and Fourteenth Amendments is the right of a political party to select "a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224. Nor can there be doubt that all electoral regulatory schemes impinge on "the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. In other words, a party's associational rights are not absolute and are subject to some degree of qualification.

Defendants argue that the resolution of this case is determined by reference to *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274 (1974). There, the Supreme Court upheld a California statute which prohibited the placement on election ballots of the names of persons running as independent candidates until one year after that person had disaffiliated from a political party. *Id.* at 736, 94 S.Ct. at 1282. The Court reasoned that the disaffiliation statute assured the "integrity of various routes to the ballot" and that the statute did not discriminate against independents. Ultimately, however, the Court rested its decision

on the state's interest in avoiding fractured elections; "[the disaffiliation rule] works against independent candidacies prompted by short-range political goals, pique, or personal quarrel." In short, the disaffiliation rule at issue in *Storer* was directed at "sore losers".

The issue before this court involves not a sore loser but, rather, a willing participant. Rep. Dawkins has expressed a willingness to appear on the ballot both as the New Party's candidate and as the candidate of another party. Indeed, Rep. Dawkins will appear on the ballot; he ran unopposed in his party primary. It appears to this court that that fact alone removes this case from the rationale of *Storer* as well as its reasoning.

The finding that *Storer* is not dispositive does not, however, end of the court's analysis. The challenged statutes burden plaintiff because it is denied the ability to place the name of its chosen candidate on the ballot. "[T]he rigorousness of our inquiry into the propriety of [these statutes] depends on the extent to which [they] burden[ ] First and Fourteenth Amendment rights." *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. at 2063.

The challenged statutes here prohibit a candidate from being the nominee, for a single office, of more than one party in a single election. Of critical import here is the fact that the New Party's associational rights are burdened only to the extent that they cannot nominate Rep. Dawkins, who has been nominated by another party. There is nothing in the cases of which this court is aware that requires a state to allow a single candidate to gather as many nominations as possible prior to the general election. The complaint centers on the New Party's desire

to narrow political opportunity by hitching their political cart to another party's star. If plaintiff wishes to run a candidate under their party's banner, they may do so by nominating any person, other than Rep. Dawkins, that it defines as its candidate.

Minnesota law provides New Party relative ease of access to the ballot. Minnesota requires that minor parties nominate their candidates by petition. Minn. Stat. §§ 204B.03, 204B.07. The number of signatures required to be on the nominating petition in this case was ten per cent of those persons voting in the last general election or "500, whichever is less". Minn. Stat. § 204B.08, Subd. 3(c). There is no requirement, as in *Anderson*, that the new party engage in rigorous and superhuman planning in order to access the ballot. Minnesota requires a minimal showing that there is sufficient interest in a candidate to justify his or her placement on the ballot. Minnesota also requires that the new or minor party nominate someone not affiliated with another party.

There is no allegation that the New Party was denied access to the ballot, *Norman*, 502 U.S. at ___, 112 S.Ct. at 704; rather, the New Party, solely because it chose as its candidate one chosen by another party as its candidate, was denied a place on the ballot because it had no properly qualified candidate. On that basis, the court finds that, like the total ban on write-in candidacies upheld in *Takushi*, Minnesota's ban on cross-filing is a reasonable politically neutral regulation which "serves merely to channel expressive activity at the polls". *Takushi*, 112 S.Ct. at 2066. Moreover, the court finds that the burden imposed upon plaintiff's First Amendment rights is not

so severe as to trigger a heightened scrutiny of the challenged statutes. *Norman*, 502 U.S. at ___, 112 S.Ct. at 704-05. (denial of access to ballot under statute prohibiting use of name of an established political party). *Cf. Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992) (striking prohibition on non-party candidates being designated on ballot as "Independents"; error to apply strict scrutiny standard as burden was not denial of access, but minor burden.)

The next step in the *Anderson* analysis is to identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by the rule. The *Anderson* analysis requires that the court determine the legitimacy and strength of each interest and consider the extent to which these interests make it necessary to burden the plaintiff's rights.

D.

Defendants set out several interests which they argue justify the questioned statute here. Defendants rest their argument primarily on *Storer* and *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2992 (1992) and put forth several interests which they argue justify the restrictions at issue in this matter. Indeed, defendants set out those matters found sufficient in *Swamp* at length. In this case, however, defendants put forth two interests which the court finds compelling.

First, defendants assert that they have a strong interest in preventing ballot generated voter confusion. What plaintiffs seek is to place Rep. Dawkins' name on the

ballot with their party designation. Rep. Dawkins, however, is already on the ballot with another party's designation. Thus, if the court accepts the arguments of the plaintiffs, Rep. Dawkins will appear on the ballot twice, once as plaintiff's candidate and once as the candidate of a different party. The court finds this situation to be persuasive evidence that plaintiff's scheme will result in voter confusion; the state has a compelling interest in setting out a ballot in which all of the candidates are treated equally and which is a plain statement of the available choices. *Swamp*, 950 F.2d at 386.

Moreover, in presenting the candidates to the electorate, defendants have an equally compelling interest in knowing how the winner will be determined. *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 857 (1972). Plaintiffs set out a scheme where the all of Rep. Dawkins's votes will be aggregated into a single total, regardless of which party designation they are owed. The flaw in this scheme is that Rep. Dawkins, then, has the opportunity not only to be chosen twice but then to have his totals aggregated so that he could lose the election under either party designation, but he could still emerge victorious after the totals were aggregated. This court finds that the prohibition of such a situation constitutes a compelling reason, in and of itself, for the cross filing ban. *Swamp, Id.* (State has compelling interest in "assuring that the winner of an election is the choice of the majority of at least a plurality of the voters.")

E.

The final step in the *Anderson* analysis is to weigh all the factors and decide whether the challenged statutes are unconstitutional. As described above, the challenged statutes do impose a minimal burden on the New Party's First Amendment rights to associate for the purpose of advancing the political rights of its members by limiting who can be the candidate of the New Party. In the final analysis, this court finds that the state has shown that its prohibition on multiple party candidacies for elective office is a valid and non discriminatory regulation of the electoral process. *See Storer*, 415 U.S. at 736, 94 S.Ct. at 1282 (maintenance of stable political system is compelling state interest); *Takushi*, 415 U.S. at ___, 112 S.Ct. at 2066-67 (prevention of unrestrained factionalism tied to relative ease of access to ballot constitutes a compelling state interest); *Swamp*, 950 F.2d at 386 (avoiding voter confusion is compelling state interest).

Plaintiff suggests that by preventing the New Party from nominating Rep. Dawkins, Minnesota has effectively burdened internal party operations. This is plainly not the case. Other than the restrictions placed on nominating candidates with other party affiliations, the New Party has the right to support whoever they want. Minnesota's election laws do not concern themselves with the political processes of the individual parties. Minnesota's interests are in protecting the integrity of the ballot box.

Finally, the court has found that there is a minimal burden placed on plaintiff by operation of the challenged statutes; the New Party is prohibited from choosing as its candidate the candidate of another party. The court has

also found that that minimal burden is justified by defendant's interests in preserving an electoral process which is fair and certain of resolution. It should be emphasized that this court does not view this case as involving denying plaintiff New Party access to the ballot, a situation which would trigger a stricter scrutiny of the challenged statutes. *See, Eu*, 489 U.S. at 222; *Norman*, 502 U.S. 279, 112 S.Ct. at 704. This case involves, rather, New Party's willingness to find another candidate who is not the candidate of another party. This court is of the opinion that the challenged statutes, even if reviewed under the stricter scrutiny called for by cases where the statutes have the effect of excluding a Party or candidate from the ballot, the statutes here pass muster.

More importantly, however, plaintiffs seek resolution of issues best resolved in the Legislature. It is apparent that issues concerning the mechanics of choosing candidates and the methods used in counting those votes, particularly where those issues are, in large part, matters of policy best left to the deliberative bodies themselves.[3] Here, there is no intrusion into the party's internal governance, no absolute prohibition on the party's participation in the electoral process, and no discrimination in the application of the challenged statutes. If plaintiffs wish to be allowed, as a matter of state law, to cross file, the state

[3] There are several states which permit the cross filing that is at issue in this case. See, e.g., Conn.Gen. Stat. § 9-453t (1990); Mass. Gen. L., ch. 54 § 41 (1991); N.H.Rev.Stat.Ann. § 659:68 (1990); N.Y. Elec. Law § 6-146 (McKinney 1994); 25 Pa. Cons. Stat. § 3010(f) (1989).

Legislature is the appropriate forum for resolution of that issue.

Accordingly, based on all the records, proceedings and arguments of the parties, **IT IS HEREBY ORDERED THAT:**

1. Summary Judgment is granted on behalf of Defendants.

DATED: September 16, 1994

/s/ Michael J. Davis
Michael J. Davis
United States
District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

TWIN CITIES AREA NEW PARTY, 757 Raymond Avenue, Suite 200A St. Paul, Minn. 55114 (612) 282-7141, Plaintiff, v. LOU McKENNA, Director, Ramsey County Department of Property Records and Revenue, and JOAN ANDERSON GROWE, Secretary of State of the State of Minnesota, Defendants.	)	Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action, brought under 42 U.S.C. § 1983, challenges the constitutionality of certain provisions of the Minnesota election law which prevent plaintiff, the Twin Cities Area New Party ("New Party" or the "Party"), from nominating a candidate for elective office if that candidate has already been nominated for that office by a major party. Plaintiff seeks declaratory and injunctive relief on the ground that this ban on cross-nominations violates plaintiff's associational rights as a political party under the First and Fourteenth Amendments to the United States Constitution.

Jurisdiction

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Venue is proper under 28 U.S.C. § 1391(b).

Parties

3. Plaintiff Twin Cities Area New Party is an affiliate of the New Party, a national political party with a progressive agenda and chapters in over a dozen states. Plaintiff was chartered as a chapter of the national party in 1993 and is based in St. Paul, Minnesota. Since its founding, plaintiff endorsed one candidate in the 1993 nonpartisan race for mayor of St. Paul; in 1994, it nominated one candidate for the state legislature and endorsed another state legislative candidate.

4. Defendant Lou McKenna is Director of the Ramsey County Department of Property Records and Revenue, in which capacity he is the principal county officer with duties relating to elections in Ramsey County under the Minnesota election law. He is sued here solely in his official capacity.

5. Defendant Joan Anderson Growe is Secretary of State of the State of Minnesota, in which capacity she is responsible for administering the Minnesota election law. She is sued here solely in her official capacity.

Facts

6. Earlier this year, Minnesota's two major parties acted to endorse candidates from among those who planned to run for various offices in the party primaries

to be held on 13 September 1994. One candidate endorsed by the Democratic-Farmer-Labor Party was incumbent State Representative Andy Dawkins, who represents District 65A in St. Paul. He is running unopposed in next month's DFL primary, and thus it is likely that he will appear on the November 1994 general election ballot as the DFL nominee.

7. In April 1994, the New Party held a nominating session, at which time the members voted to nominate Andy Dawkins as the New Party candidate for District 65A in the November 1994 general election. The Party also voted to endorse (but not formally nominate) another candidate running for State Representative from a Minneapolis district.

8. Under Minn. Stat. §§ 204B.03 and 204B.07, a minor party such as the New Party does not select candidates in a primary. Instead, it must file nominating petitions containing the requisite number of signatures for each candidate it has nominated.

9. In July 1994, the New Party gathered more than the requisite number of signatures on a nominating petition which would allow Rep. Dawkins to appear on the November 1994 ballot as the New Party candidate in District 65A.

10. On 18 July 1994, the New Party attempted to file in a timely fashion its nominating petition at the Ramsey County Department of Property Records and Revenue, which is responsible for the administration of elections held in that county.

11. An official at that Department refused to accept the New Party's nominating petition, however. Instead, Party representatives were handed a letter, also dated 18 July 1994 and signed by Joan M. Pelzer, Supervisor of Elections/Voter Registration, who was acting on behalf of defendant McKenna.

12. In her letter, Ms. Pelzer advised that she could not accept the New Party's nominating petition because Rep. Dawkins had previously filed an Affidavit of Candidacy as the DFL candidate for that seat. As authority for this action, Ms. Pelzer's letter cited Minn. Stat. § 204B.06, subdivision 1, which requires candidates to file affidavits of candidacy stating that the candidate "[h]as no other affidavit on file as a candidate for any office at the same primary or next ensuing general election."

13. Other parts of Minnesota's election law which both defendants enforce and administer also prevent plaintiff from cross-nominating candidates (such as Rep. Dawkins) who have been nominated by a major party. Thus, Minn. Stat. § 204B.04, subdivision 1, states with respect to major party candidates:

> No individual shall be named on any ballot as the candidate of more than one major political party. No individual who has been certified by a canvassing board as the nominee of any major political party shall be named on any ballot as the candidate of any other political party at the next ensuing general election.

Subdivision 2 of that statute says in relevant part: "No individual who seeks nomination for any partisan office at a primary shall be nominated for the same office by nominating petition."

14. The enforcement of these statutes by defendant McKenna, as reflected by the Department's refusal to accept plaintiff's nominating petition, has prevented the New Party from placing its duly nominated candidate for State Representative from District 65A on the ballot in the November 1994 general election ballot.

15. Plaintiff plans to nominate candidates for office in the future, both for offices voted upon within one county, which are administered by county officials such as defendant McKenna, as well as offices which are filled by voters in more than one county, elections to which are administered by defendant Growe. In order to maximize its effectiveness as a minor political party, the New Party also plans to nominate candidates who have been nominated by a major party. The Party anticipates that some candidates who are nominated by a major party will accept the New Party endorsement if it is offered, as Rep. Dawkins did in 1994.

16. Defendants' enforcement of the statutes cited in this complaint is preventing and will prevent the New Party from pursuing a "fusion" strategy by cross-nominating candidates who have also been endorsed by a major party.

17. Plaintiff has suffered and is continuing to suffer irreparable injury as a result of defendants' enforcement of the cited statutes, which injury will continue absent relief from this Court.

Cause of Action

18. Defendant McKenna's refusal to accept the nominating petition for the New Party's duly-chosen candidate for State Representative from District 65A, as well as his failure to place that candidate's name on the November 1994 as the candidate of the New Party, as well as the Democratic-Farmer-Labor Party, all in reliance on Minn. Stat. §§ 204B.06, subdivision 1, as well as defendants' enforcement generally of that provision and Minn. Stat. § 204B.04, subdivisions 1 and 2, violate plaintiff's associational rights as a political party under the First and Fourteenth Amendments to the United States Constitution.

19. Specifically, defendants' enforcement of these laws impinges on the New Party's rights to free political speech and association by restricting the Party's ability to select candidates for electoral office, thus hampering plaintiff's ability to spread its message among the electorate, identify candidates who best represent the Party's political preferences, and advance the purposes of its political association. The New Party has a right under the First and Fourteenth Amendments to nominate candidates for elective office even if those candidates have been nominated for that post by another party. There is no basis in law for refusing to accept plaintiff's nominating petition and to place plaintiff's candidate on the November ballot.

Prayer for Relief

WHEREFORE, plaintiff respectfully prays that this Court: (1) Declare that (a) Minn. Stat. § 204B.06, subdivision 1, violates the First and Fourteenth Amendments to the United States Constitution insofar as it prohibits a candidate from accepting the nomination of a minor political party as well as the nomination of a major political party for the same office; and (b) Minn. Stat. § 204B.04, subdivisions 1 and 2, violate the First and Fourteenth Amendments to the United States Constitution insofar as they prohibit plaintiff, as a minor political party, from nominating for elective office a candidate who has also been nominated for that office by a major political party.

(2) Preliminarily and permanently enjoin defendants from enforcing said statutes in a manner inconsistent with the declaration in paragraph (1) and from (a) taking any actions which would result in omitting from the November 1994 election ballot the name of Andy Dawkins as the candidate of New Party, as well as of the Democratic-Farmer-Labor Party, for State Representative in District 65A, and (b) refusing to cumulate votes cast for Rep. Dawkins on both party lines or to certify him as having been elected to legislative office, if he does in fact prevail in the November 1994 general election, on the ground that the candidate was in violation of Minn. Stat. §§ 204B.06, subdivision 1, and 204B.04, subdivisions 1 and 2.

(3) Award plaintiff its costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

(4) Grant such other and further relief as the Court may deem just and proper.

PUBLIC INTEREST PROJECT
OF HAMLINE UNIVERSITY
SCHOOL OF LAW

By: /s/ Kenneth E. Tilsen
Kenneth E. Tilsen
Hamline University
School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 644-1744
Attorneys for Plaintiffs

Of Counsel:
Cornish F. Hitchcock
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Sara E. Siskind
Davis, Miner, Barnhill & Galland, P.C.
44 East Mifflin Street, Suite 803
Madison, Wis. 53703
(608) 255-5200

Dated: 10 August 1994

Minn. Stat. § 204B.04, Subd. 2 (1994)

Candidates seeking nomination by primary. No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.13, subdivision 4.

Minn. Stat. § 204B.06, subd. 1 (1994)

FILING FOR PRIMARY; AFFIDAVIT OF CANDIDACY.

Subdivision 1. **Form of affidavit.** An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

(a) Is an eligible voter;

(b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election; and

(c) Is, or will be on assuming the office, 21 years of age or more, and will have maintained residence in the district from which the candidate seeks election for 30 days before the general election.

An affidavit of candidacy must include a statement that the candidate's name as written on the affidavit for ballot designation is the candidate's true name or the name by which the candidate is commonly and generally known in the community.

An affidavit of candidacy for partisan office shall also state the name of the candidate's political party or political principle, stated in three words or less.

Minnesota Senate File No. 2720, § 10

Sec. 10. [EFFECTIVE DATE.]

This act is effective for the state primary election in 1996 and thereafter.

The amendments made by this act are suspended during any time that the decision of the eighth circuit court of appeals in Twin Cities Area New Party v. McKenna, No. 94-3417MN, is stayed or the mandate of the court is recalled. If the McKenna decision is reversed, the amendments made by this act expire and the prior law is reviewed. The purpose of this paragraph is to provide an orderly procedure for complying with the McKenna decision while retaining the prior law prohibiting simultaneous nominations to the extent permitted by the United States Constitution.

No. 95-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOU McKENNA, Director, Ramsey County Department of Property Records and Review, and JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,

Petitioners,

v.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

SARAH E. SISKIND
DAVIS, MINER, BARNHILL & GALLAND
44 East Mifflin Street
Suite 803
Madison, Wis. 53703
(608) 255-5200

JOEL ROGERS
University of Wisconsin
Law School
Madison, Wis. 53706
(608) 262-4295

CORNISH F. HITCHCOCK
(Counsel of record)
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

KENNETH E. TILSEN
PUBLIC INTEREST PROJECT OF HAMLINE UNIVERSITY SCHOOL OF LAW
1536 Hewitt Avenue
St. Paul, Minn. 55104-1284
(612) 644-1744
Attorneys for Respondents

26 April 1996

QUESTION PRESENTED

May a state, consistent with the First and Fourteenth Amendments, prohibit a political party from nominating a fully qualified candidate of its choice, when the state's only objection is that the candidate is also the nominee of another party?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1608

LOU McKENNA, Director, Ramsey County Department of Property Records and Review, and JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,
Petitioners,

v.

TWIN CITIES AREA NEW PARTY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN RESPONSE TO PETITION

In this case, the Eighth Circuit held that Minnesota's ban on multiple-party nominations works a severe and unwarranted burden on a minor political party's core First Amendment right to establish itself as a political party, "to select a standard bearer who best represents the party's ideologies and preferences," *Eu v. San Francisco County Democratic Central Commission*, 489 U.S. 214, 224-(1989) (internal quotation omitted), and to "broaden [its] base of public participation in and support for [its] activities," *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

A. Respondent Twin Cities Area New Party submits that the opinion below cogently and persuasively speaks for the correctness of that holding. Nonetheless, respondent agrees with petitioners that this case warrants review by this Court. In this response, we therefore add the following comments regarding why we believe the Court should exercise its discretionary review authority.

First, the Eighth Circuit's opinion is, as petitioners state, in direct and irreconcilable conflict with the Seventh Circuit's opinion in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), which upheld a similar ban on multiple-party nominations. The internal division in *Swamp* further demonstrates the discord in the lower courts on the constitutional question presented here. The three-judge panel could not agree on a single rationale why the ban was valid, and Judges Posner, Easterbrook and Ripple issued an opinion dissenting from the denial of rehearing *en banc* which forcefully rejected the majority and concurring analyses as inconsistent with the standards established by this Court.

Second, the decision below does, as petitioners also state, call into question the validity of similar election laws in some 40 states.

Third, litigation on the constitutional issue here is already pending and likely to recur. See, e.g., *Patriot Party of Allegheny County v. Allegheny County Department of Elections*, No. 95-3385 (3d Cir.)(argued 28 March 1996); *The Green Party of New Mexico v. Gonzalez*, Civ. No. 96-439 BB/JHG (D.N.M.).

There is, we recognize, always a question of judgment as to when the process of litigating elucidation has run its course. But given the conflict in the circuits, and the importance of the constitutional issue, we submit that little would be gained by postponing review.

Finally, at a time of growing citizen disquiet with the rigidities of an entrenched two party system, and the deleterious effects of that system on effective political action and the responsiveness of elected representatives to their electors, the prompt and authoritative resolution of this issue has particular urgency.

B. While *certiorari* papers are not the proper place to debate sensitive constitutional questions in depth, two points that clarify the substantive disagreement between the parties are, we believe, in order.

The petition argues that Minnesota's ban on a multiple-party nomination is constitutional as only a modest regulation of political candidates. This is not, however, a case about the right of *individuals* to choose their parties; it is about the right of *political parties* to choose their candidates.

Precisely for this reason, petitioners' effort to bring this case within this Court's ruling in *Storer v. Brown*, 415 U.S. 714 (1974), must fail. *Storer* involved a California "disaffiliation" statute that prohibited independent "sore loser" candidacies by individuals who had been members of a major party for a certain period of time prior to the major party primary. *Storer* thus concerned the rights of individuals to run as independent *candidates*, not the associational rights of *parties* to chose their nominees. This Court's decisions

recognize that an individual's right to be a candidate is simply not on a constitutional par with a party's right to choose its own candidates. *See Clements v. Fashing*, 457 U.S. 957, 963-65 (1982)(plurality opinion); *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134, 143 (1972). In light of this distinction, it follows that *Storer* does not speak to the question presented here.

CONCLUSION

For these reasons, respondent does not oppose the petition for certiorari.

Respectfully submitted,

SARAH E. SISKIND
DAVIS, MINER,
BARNHILL & GALLAND
44 East Mifflin Street
Suite 803
Madison, Wis. 53703
(608) 255-5200

JOEL ROGERS
University of Wisconsin
Law School
Madison, Wis. 53706
(608) 262-4295

CORNISH F. HITCHCOCK
(Counsel of record)
DAVID C. VLADECK
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

KENNETH E. TILSEN
PUBLIC INTEREST PROJECT
OF HAMLINE UNIVERSITY
SCHOOL OF LAW
1536 Hewitt Avenue
St. Paul, Minn. 55104
(612) 644-1744

Attorneys for Respondents

26 April 1996

(3)

No. 95-1608

In The

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October Term, 1995

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Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT APPENDIX

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

PETER M. ACKERBERG
Assistant Attorney General
Counsel of Record

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
(612) 282-5718

Counsel for Petitioners

CORNISH F. HITCHCOCK
Public Citizen Litigation Group
1620 20th Street, N.W.
Washington, D.C. 20009-1001

(202) 588-1000

Counsel for Respondent

Petition For Certiorari Filed April 4, 1996
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* "Pet. App. __" designates appendix pages to the Petition For A Writ Of Certiorari.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Aug 10, 1994 – Plaintiff files complaint.

September 15, 1994 – Order granting summary judgment to defendants.

September 16, 1994 – Amended order and memorandum granting summary judgment to defendants.

September 26, 1994 – Plaintiff's Notice of Appeal filed.

January 5, 1996 – Opinion and judgment of the Court of Appeals for the Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THIRD DIVISION

TWIN CITIES AREA NEW PARTY,	)	
Plaintiff,	)	Civil Action No. 3-94-953
v.	)	
LOU McKENNA, Director, Ramsey County Department of Property Records and Revenue, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF M.J. MAYNES

M.J. Maynes hereby declares and states as follows:

1. I am the Chair of the Steering Committee of the Twin Cities Area New Party ("the New Party" or the "Party"), which has offices at 757 Raymond Avenue, Suite 200A, in St. Paul. I am also a registered voter and member of the New Party. I am familiar with the facts alleged in our complaint in this case and am authorized to give this affidavit on behalf of the Party in support of plaintiff's motion for a preliminary injunction.

Factual Background

2. The Twin Cities Area New Party was chartered as a chapter of the national New Party in the spring of 1993. The New Party is a progressive political party with chapters in more than a dozen states. Its platform emphasizes

basic human needs and services, such as quality schools, safe neighborhoods, affordable housing, progressive taxation, guaranteed equal access to quality health care, and good-paying jobs, as well as labor law reform to strengthen unions, equal pay for equal work, environmental protection, responsible and ecologically-sustainable economic development, and an end to all forms of discrimination. The New Party is also committed to the principle that a political party should be free to nominate those candidates who best represent the views and interests of that party. For that reason, the New Party opposes state laws that prevent multi-party nominations or pursuit of a "fusion" strategy of the sort I will discuss later in this affidavit.

3. In April 1994, the New Party convened a membership meeting, at which time the members duly voted to nominate Andy Dawkins as the party's candidate for District 65A, located in St. Paul, in the November 1994 general election. The Party also voted to endorse (but not formally nominate) another candidate running for State Representative from a Minneapolis district.

4. The New Party is considered a minor political party under the Minnesota election law, and thus it does not nominate candidates in a primary. Instead, it must file nominating petitions containing the requisite number of signatures for each candidate it has nominated.

5. In order to nominate a candidate for State Representative, the New Party must obtain 500 signatures on a nominating petition. In July 1994, the New Party gathered approximately 600 signatures on a nominating petition to

have Andy Dawkins to appear on the November 1994 election ballot as the New Party candidate in District 65A.

6. On July 18, 1994, I went with several other people to the Ramsey County Department of Property Records and Revenue to file the Party's nominating petition containing the nearly 600 signatures. The Secretary of State's office had advised me that this is the proper department for filing nominating petitions when a district is located entirely within one county, and District 65A lies wholly within Ramsey County.

7. When we arrived, I tried to file the nominating petition with an election official at the front desk, who refused to accept it. While we waited, that official consulted with Joan M. Pelzer, Supervisor of Elections/Voter Registration in the Department, and Ms. Pelzer typed up and gave us a letter, also dated July 18, 1994, which explained the Department's action. A copy of that letter is attached as Plaintiff's Exhibit 1.

8. In her letter, Ms. Pelzer explained that she could not accept the Party's nominating petition because Rep. Dawkins had previously filed an Affidavit of Candidacy as the DFL candidate for that seat. As authority for this action, Ms. Pelzer cited subdivision 1 of Minn. Stat. § 204B.06, which requires candidates to file affidavits of candidacy stating that the candidate "[h]as no other affidavit on file as a candidate for any office at the same primary or next ensuing general election."

9. Apart from the statute cited by Ms. Pelzer, several provisions in Minn. Stat. § 204B.04 also prevent the New Party from cross-nominating candidates (such as Rep. Dawkins) who have been nominated by a major

party. That statute states that no candidate certified by a canvassing board as the nominee of any major political party shall be named on any ballot as the candidate of any other political party at the next ensuing general election. It adds that no person who seeks nomination for any partisan office at a primary shall be nominated for the same office by nominating petition.

10. As a result of the enforcement of these statutes by county officials, the New Party will not be able to have its duly-nominated candidate for State Representative from District 65A appear on the general election ballot this November. Also, the continued enforcement of these statutes by county officials (and, in the case of multi-county offices, by the Secretary of State) will prevent the New Party from cross-nominating candidates and having them appear on future ballots. Thus, the New Party is turning to this Court for relief.

11. As the New Party wages a grassroots effort to grow and becomes better known, it plans to take a more active political role in the Twin Cities area. Thus, the Party plans to nominate its own candidates for office, and, to maximize its effectiveness as a minor political party, the Party also plans to pursue a multi-party nomination or "fusion" strategy, by which it will selectively cross-nominate major party candidates whom the Party believes can best articulate and advance the Party's views on the issues. I anticipate that this will include candidates running for offices wholly within one county, as well as for offices involving more than one county. It is my belief that some candidates nominated by a major party will accept the New Party's endorsement if it is offered, as Rep. Dawkins did in 1994.

12. The existence and enforcement of "anti-fusion" statutes by the Secretary of State and county officials prevent a minor party from pursuing a "fusion" electoral strategy. The restrictions at issue here thus adversely affect the New Party's ability to function as a party, as I will now explain.

The Effect of Anti-Fusion Restrictions on the Party

13. The New Party engages in electoral activity for the same reasons as the established parties. The Party seeks to promote candidates whose views best represent its members' views, to use the electoral process to publicize its own political commitments, and to widen its popular base of support.

14. As a fledgling, third party with a loyal, but small base of support, the New Party believes that a "fusion" strategy, which allows the Party selectively to nominate candidates also endorsed by a major party, can help get our message across and attract a wider range of voters.

15. Many credible candidates will not gamble on running solely as a third-party candidate, even when they are in general agreement with the principles of the party. Similarly, I have talked to voters who may be willing to vote for New Party candidates as a symbolic expression of their political views. However, many voters, even those who share our views, will not gamble on supporting a candidate who is nominated solely by a third party. People express the concern that they will be "wasting"

their vote on a candidate with no serious chance of being elected.

16. As a small, newly organized third party, the New Party is distinctly a minority party which lacks a credible threat of winning many elections on its own unless it acts in coalition with others. The same is not true of the major parties, each of which has demonstrated an ability to win elections. Thus, the ban on multi-party nominations which we challenge here has a disproportionate and negative impact on third parties such as the New Party when they seek to compete in the electoral arena, publicize their views, or widen their popular base of support. So long as the New Party is relegated to third-party status, many people will regard the Party only as a vehicle for casting a protest vote and may perceive such a vote as being "wasted."

17. The existence and operation of anti-fusion laws thus interferes with the Party's ability to spread its message among the electorate and to identify those candidates who best represent the Party's political preferences and interests, thus advancing the Party's mission and purposes as a political party.

18. A cross-endorsement strategy can be highly effective in hotly contested elections, for example, where a candidate is elected to office by a margin which is smaller than the number of votes he received on the minor party's line, but the candidate wins when one includes the number of votes cast for him or her on a third party's line. The pursuit of such a strategy is foreclosed to the New Party and other third parties under the statutes at issue in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed at St. Paul, Minnesota this 5th day of August, 1994.

/s/ M.J. Maynes
M.J. Maynes

[Note – Exhibit 1 Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

TWIN CITIES AREA NEW PARTY,	)	
Plaintiff,	)	Civil Action No. 3-94-953
v.	)	
LOU McKENNA, Director, Ramsey County Department of Property Records and Revenue, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF ANDY DAWKINS

Andy Dawkins hereby declares and states as follows:

1. I live in St. Paul, Minnesota. I am a registered voter and a member of the Democratic-Farmer-Labor Party. I am presently a State Representative from District 65A, an office to which I was first elected as the DFL candidate in 1987.

2. In 1994, I filed an Affidavit of Candidacy as the endorsed DFL candidate seeking to be reelected from District 65A. I am unopposed in the September primary election and thus expect to be the DFL candidate on the November 1994 general election ballot.

3. In April 1994, I was invited to attend a meeting of the Twin Cities Area New Party, a new political party in this area, which had also endorsed me when I ran for Mayor of St. Paul in 1993. I did meet with Party members,

and the Party voted to formally nominate me as its candidate in the November election, in addition to my DFL nomination. I was and am willing to accept the nomination of both parties and to run on both lines in the November election.

4. I am aware also that the New Party gathered the requisite number of signatures on a nominating petition to have me appear on the ballot as its candidate, but the petition was not accepted by Ramsey County election officials because I had previously filed an Affidavit of Candidacy as the DFL candidate.

5. I have been a member of the DFL Party all my adult life, and I plan to remain a member for the rest of my life because I believe in the principles of that Party. Thus, if I am allowed to run as both the DFL candidate and New Party candidate, and if I am reelected to another term as State Representative, I would continue to vote and act as a DFL Party member. I do, however, believe in the principle that political parties should be free to nominate those candidates whom they believe will best advance the party's goals. Although I am not a plaintiff in the New Party's lawsuit, I understand that the vindication of that principle is the New Party's aim in the litigation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed at St. Paul, Minnesota, this 5 day of August, 1994.

/s/ Andy Dawkins
Andy Dawkins

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

TWIN CITIES AREA NEW PARTY,

Plaintiffs,

v.

LOU MCKENNA, DIRECTOR, RAMSEY COUNTY; JOAN ANDERSON GROWE, SECRETARY OF STATE

Defendants.

Case No. Cv. 3-94-953

DECLARATION OF WALTER DEAN BURNHAM

I, Walter Dean Burnham, declare as follows:

1. I am a professional political scientist. Since 1988 I have been Frank C. Erwin Jr. Centennial Chair in Government at the University of Texas in Austin. For the seventeen years preceding, I was on the faculty of the Department of Political Science at the Massachusetts Institute of Technology. Throughout my professional career I have specialized in the study of the history and present operation of the American electoral system, political parties, and election processes. I have written and lectured extensively on these subjects. (See *curriculum vitae,* attached to this declaration.)

2. I have been asked by lawyers for the Twin Cities Area New Party to give a declaration concerning our national experience with multiple-party nomination

("MPN") of candidates. In providing such, I will confine myself to: (a) sketching the background problems in our electoral system to which MPN is responsive,; (b) indicating the incidence of MPN in American electoral history; (c) indicating the effects of MPN activity on the representativeness and stability of our country's political institutions.

3. This is a continent-sized country with a quarter of a billion inhabitants. With rare exceptions, its politics have been organized by two and only two political parties at least since the time of Andrew Jackson a century and a half ago.

4. In most other democracies in the Western world, the difficulty of accommodating all major currents of opinion and interest in electoral politics has produced electoral laws which through one or another scheme of proportional representation ("PR"). Such schemes attempt to conform the distribution of elected officials to the distribution of partisan sentiment through the use of multiple-member districts, and the assignment of, for example, legislative positions on the basis of the proportion of the total vote claimed by different parties with such districts. Thus, for example, in a pure PR system of election with an election district covering 10 legislative seats, if Party A received 60 percent of the vote cast within that district, Party B 30 percent, and Party C 10 percent, Party A would gain six legislative seats, Party B three, and Party C one.

5. In the United States, by contrast, elections are generally decided by simple-plurality ("first past the

post") elections rules, applied within single-member election districts (e.g., Congressional districts, or state-wide districts for state-wide offices). In such a system, the "winner takes all." In the above example, for example, a representative of Party A would gain the legislative seat. Parties B and C would have no legislative gain to show for their demonstrated voter support, even though they commanded a substantial (40 percent) minority of the voters.

6. It is well known that such first-past-the-post or winner-take-all electoral regimes create formidable barriers to the electoral viability of third parties. Even voters who support such parties' program or ideology are discouraged from voting for them, for the simple reason that their vote appears certain to be wasted. If such voters vote at all, they will simple choose the major party standing somewhat closer to their own views than the opposing establishment. And, quite often, they do not vote, a fact that we know from the established observation that turnout rates tend to be consistently lower over time in first-past-the-post countries than in those that have at least some proportionality in translating votes into bits of political power.

7. The historical record bears witness to the existence of efforts to deal with this very real problem of democracy.

8. In the U.S., extensive state regulation of political parties (a phenomenon itself essentially unknown in other western democratic political systems) effectively began in the 1890s and intensified during the "Progressive" period of political reform circa 1905-1915. Very

many of these regulations were explicitly crafted to limit the role parties played in American politics prior to that time (the role of third parties providing an especially prominent object), and not, for example, merely to ensure against fraud or other abuse of party power. Given the character of these regulations, and the importance of party organization for the effective functioning of a modern mass democracy, I join my last mentor V.O. Key, Jr. (see *American State Politics* (New York: 1956)) in the judgment these reforms have in the main been deleterious to the health of democracy in this country.

9. Prior to this anti-partisan upheaval, parties were very largely free to do as they saw fit. On the issue that concerns us here, MPN, the record shows that the phenomenon was very widespread, particularly during the second half of the 19th century (that is, after the emergence of the modern Republican and Democratic parties). Indeed in some regions of the country, including much of the Midwest and West, it was very nearly routine during this period. At the national level, a late example of the practice is provided by the presidential election of 1896. In Pennsylvania the Democratic nominee, William Jennings Bryan, ran on three party-label tickets and his Republican challenger, William McKinley, ran on two. In California, Bryan was both the Democratic and the Populist nominee and ran on both tickets, winning one of the state's electors. Such extensive use of MPN reflected recognition by party leaders, with strong organizations, that there were important streams of public opinion that could not credibly or legitimately by channeled into a polar choice between the two major parties of the period.

10. Practice of MPN in the 20th century has, of course, been much more limited. This owes chiefly to the fact that most state legislatures, as part of the anti-partisan upheaval described above, outlawed the practice. However, there have always been exceptions to this general ban.

11. The prominent contemporary example of the MPN system is New York State, which re-legalized MPN in 1936 and has operated with an MPN regime ever since. In New York, predictably, this has permitted electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in the selection of mainstream candidates. The most important examples of the sorts of third parties underwritten by the MPN practice in New York are the American Labor Party (now defunct), and the Liberal and Conservative parties, which remain active. These parties have had measurable influence on New York politics, either by using their cross-nomination powers to influence the nomination choices of the major parties, or, where such influence failed, by providing an alternative line for candidates. The Liberals, for example, were important in securing liberal Republican John Lindsay's tenure as mayor of New York City in the late 1960s, and – by refusing to endorse the Democratic nominee – securing conservative Republican Alphonse D'Amato's election to the U.S. Senate in 1980. The Conservatives have been influential in similar ways, even succeeding in electing their own candidate, John Buckley, to the U.S. Senate in 1970, over both the Democratic and Republican nominees. With MPN, it follows as a matter of course that one major party nominee may trail the candidate of the other

major party in the major party vote, but nonetheless win the election by virtue of additional votes garnered on the line of a third party that has also nominated that candidate. Examples of this in New York are numerous. Three at the presidential level are Franklin Delano Roosevelt's victories over Wendell Willkie in 1940 and Thomas Dewey in 1944, and John Kennedy's victory over Richard Nixon in 1960. Each of these was a victory for the Democratic Party nominee, despite the fact that that nominee secured fewer votes than the Republican nominee on the Democratic Party line. The victories owed to support for the Democratic nominee expressed through votes for him on third party (American Labor/Liberal) lines.

12. There is one 20th century instance of MPN which does not fit this characteristic mode: the California cross-filing system of 1911-54. What is important to appreciate about the California case was that it was substantially different in origins and effect from the rest of both 19th and 20th century MPN experience. Specifically, the California system was designed to promote "party-busting" to a very high degree by permitting major-party candidates to run also as candidates of the other major party. If such a candidate won both major-party nominations (as, for example, former Chief Justice Earl Warren did in his 1946 race for Governor), he would run unopposed in the general election. This law was quite effective in placing candidate qualities at a premium and parties at a very low discount. It was repealed when a different view of the importance of party in organizing the government became the majority view. In any case, the system was exceptional; it should not be treated as in any way exemplary of MPN politics in the 19th or 20th centuries.

13. From the history of MPN use in the U.S., both in the 19th century and at present, we can draw four broad conclusions of relevance to the Twin Cities New Area Party challenge to the Wisconsin ban on MPN. First, it is clear that the availability of the MPN option improves the electoral viability of third parties; conversely, the maintenance of an MPN-ban can be said to have a disproportionately negative impact on third party viability. Thus in addition to infringing the associational liberties of third parties and their members, the ban does have a decided "monopoly" effect, limiting the viability of third party representation and with it, the range of electoral choice available to voters. Second, at no point has the practice of MPN politics, either in the 19th century or the 20th, given rise to excessive "factionalism" or "fragmentation" of the sort that would undermine our political system's stability. To the contrary, a review of the MPN experience suggests that its practice almost certainly helps to promote rather than undermine democratic stability, not least by providing the public with confidence that the electoral system was not being deliberately rigged against major dissenting streams of public sentiment. MPN activity, via its positive effect on third party viability, can be expected to lead over time to increase voter participation in the political system – one reflection of greater public confidence and democratic strength. Third, there is no evidence on the literature on "fusion" or MPN politics that multiple party nominations have caused confusion among voters. Fourth, the history of state bans on MPN in the U.S. shows them to be the product of efforts to limit electoral competition and otherwise restrict representation of minority views. As such, such bans are inconsistent with

core constitutional commitments to preserving associational freedom in our party system, as well as in other aspects of American public life.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of August, 1994, at Austin, Texas.

/s/ Walter Dean Burnham
Walter Dean Burnham

August 1990

CURRICULUM VITAE
WALTER DEAN BURNHAM

PERSONAL BACKGROUND:

Date of Birth: June 15, 1930, in Columbus, Ohio
Marital Status: June 7, 1958, to Patricia Ann Mullan. Two Children, John (b. 1965) and Anne (b. 1967).
Military Service: U.S. Army, 1953-1956

EDUCATION:

PhD., Harvard University, 1962
M.A., Harvard University, 1958
B.A., Johns Hopkins, 1951

ACADEMIC APPOINTMENTS:

Frank C. Erwin, Jr., Centennial Professor of Government,
University of Texas at Austin, 1988 –
Professor, Massachusetts Institute of Technology, 1971-1988 (Ruth and Arthur Sloan Professor of Political Science, 1984-1988)

Associate Professor and Professor, Washington University (St. Louis), 1966-1971
Assistant Professor, Haverford College, 1964-1966
Assistant Professor, Kenyon College, 1961-1963
Instructor, Boston College, 1958-1961

PUBLICATIONS:

Books

Presidential Ballots, 1836-1892 (Baltimore: Johns Hopkins Press, 1955)

The American Party Systems: Stages of Political Development (Ed. with William N. Chambers), (New York: Oxford University Press, 1967, 1975).

Critical Elections and the Mainsprings of American Politics (New York: Norton, 1970)

Politics/America: The Cutting Edge of Change (New York: Van Nostrand, 1973). A selection of articles from *Trans-Action/Society* with extensive editorial commentary.

American Politics and Public Policy (Ed. with Martha W. Weinberg), (Cambridge: MIT Press, 1978); a memorial volume for Professor Jeffrey L. Pressman.

The Current Crisis in American Politics (New York: Oxford University Press, 1982)

Democracy in the Making (Englewood Cliffs, NJ: Prentice-Hall, 1983, 1986)

"The 1976 Election: Has the Crisis Been Adjourned?" in W. D. Burnham and M. W. Weinberg (eds.), *American Politics and Public Policy, op. cit.*, pp. 1-25.

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"The Constitution, Capitalism and the Need for Rationalized Regulation" in Robert A. Goldwin and William A. Schambra (eds.) *How Capitalistic is the Constitution?* (Washington: American Enterprise Institute, 1982), pp. 75-105.

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"The 1984 Election and the Future of American Politics" in Ellis Sandoz and C. B. Crabb, Jr. (eds.), *Election 84: Landslide Without Mandate?* (New York: New American Library, 1985), pp. 204-260.

"Those High Nineteenth-Century American Voting Turnouts: Fact or Fiction?" *Journal of Interdisciplinary History*, Vol. 16. 16, No. 4 (Spring 1986), pp. 613-644.

"Periodization Schemes and 'Party Systems': The "System of 1896" as a Case in Point," Social Science History, Vol. 10, No. e (Fall 1986), pp. 263-324. This particular issue of SSH is a symposium centered around my work.

"Elections as Democratic Institutions" in Kay L. Schlozman (ed.), *Elections in America* (Boston: Allen & Unwin, 1987), pp. 27-62.

"The Alabama Senatorial Election of 1962: Return of Interparty competition," *Journal of Politics* 26 (1964): 789-829

"The Changing Shape of the American Political Universe," *American Political Science Review* 59 (1965): 7-2.

"American Voting Behavior and the 1964 Election," Midwest Journal of Political Science 12 (1968): 1-40. Also published in Melvin Richter (ed.), *Essays in Theory and History: An Approach to the Social Sciences* (Cambridge: Harvard University Press, 1970), pp. 186-220.

"Election 1986: The Abortive Landslide," Trans-Action 6 no. 2 (1969): 12-22.

"Additive and Multiplicative Models of the Voting Universe: The Case of Pennsylvania, (With John D. Sprague) 1960-1968," *American Political Science Review* 64 (1970): 471-490.

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"Theory and Voting Research: Some Reflections on Converse's 'Change in the American Electorate'," *American Political Science Review* 68 (1974): 1002-1023 + immediately following discussion.

"The United States: The Politics of Heterogeneity," in Richard Rose (ed.), *Electoral Behavior: A Comparative Handbook* (New York: Free Press, 1974), pp. 653-725.

"Party Systems and the Political Process," in W. D. Burnham and W. N. Chambers (eds.), The American Party Systems, *op. cit.*, pp. 277-307 (1967/1975 editions).

"American Politics in the 1970s: Beyond Party?" *ibid.* (1975), pp. 308-357. Reprinted in Louis Maisel and Paul Sacks (eds.), *The Future of Political Parties* (Beverly Hills: Sage, 1975), pp. 238-277.

"Insulation and Responsiveness in Congressional Elections, *Political Science Quarterly* 90 (1975): 411-435.

"Revitalization and Decay: Looking Toward the Third Century of American Electoral Politics," *Journal of Politics* 38 (1976): 146-172.

Review Essay, "The Politics of Crisis," *Journal of Interdisciplinary History* 8, No. 4 (Spring 1978): 747-763.

"Great Britain: The Death of the Collectivist Consensus?" in Louis Maisel and Joseph Cooper (eds.), *Political Parties: Development and Decay* (Beverly Hills: Sage, 1978), pp. 267-308.

"The Turnout Problem" in A. James Reichley (ed)., *Elections American Style* (Washington: Brookings, 1987).

"V. O. Key, Jr., and the Study of Political Parties," in Milton C. Cummings (ed.), *V. O. Key, Jr., and the Study of American Politics* (Washington: American Political Science Association, 1988), pp. 3-23.

"The Reagan Heritage," in Gerald R. Pomper (ed.), *The Election of 1988* (Chatham, NJ: Chatham House, 1989).

"Critical Realignment: Dead or Alive?" in Byron E. Shafer (ed.), *The End of Critical Realignment?* (Madison: University of Wisconsin Press: in press as of 3rd Quarter 1990)

AWARDS, HONORS, ETC.

SSRC Fellowship 1973-1964. Spent at Ann Arbor, Michigan, on initial stages of organization of the Inter-University Consortium electoral data archive.

Guggenheim Fellowship, 1974-75. Spent on research in London.

Fellow, Center for Advanced Study in the Behavioral Sciences, Palo Alto, California (1979-1980).

Honorary doctorate (Litt.D) awarded by Rutgers University, 1982.

ASSOCIATIONS

American Political Science Association
American Academy of Arts and Sciences (elected 1978)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Twin Cities Area New Party,

Plaintiff,

vs.

Lou McKenna, Director, Ramsey County Department of Property Records and Revenue; Joan Growe, Secretary of the State of Minnesota,

Defendants.

ORDER

(Filed Sept. 15, 1994)

File No. 3-94-953

The above entitled matter came on for hearing before the Honorable Michael J. Davis on September 9, 1994 on Plaintiff's motion for injunctive relief pursuant to Fed.R.Civ.P. 65. Pursuant to the agreement of the parties and order of this Court, the matter was consolidated and hearing was had on the merits pursuant to Fed.R.Civ.P. 56.

Sarah E. Siskind, Esq., Kenneth E. Tilsen, Esq., and Cornish F. Hitchcock, Esq., appeared for and on behalf of Plaintiff.

Kristine Legler Kaplan, Esq., and Peter M. Ackerberg, Esq., appeared for and on behalf of Defendants.

ORDER

Accordingly, based upon the above, and all files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Summary Judgment is granted on behalf of Defendants.

2. An amended Order with accompanying Memorandum shall be filed prior to 5:00 p.m., September 16, 1994.

Date: Sept. 14, 1994

/s/ Michael J. Davis
Michael J. Davis
United States District Court
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

TWIN CITIES AREA NEW PARTY,

Plaintiff,

v.

LOU McKENNA, Director, Ramsey County Department of Property Records and Revenue, and JOAN ANDERSON GROWE, Secretary of State of Minnesota,

Defendants.

Civil Action
No. 3-94-953

NOTICE OF APPEAL

(Filed
Sept. 26, 1994)

Plaintiff Twin Cities Area New Party hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order dated 14 September 1994 granting summary judgment to defendants, as well as the amended order dated 16 September 1994.

Respectfully submitted,

Sarah E. Siskind
Davis, Miner, Barnhill
& Galland, P.C.
44 East Mifflin Street
Suite 803
Madison, Wis. 53703
(608) 255-5200

PUBLIC INTEREST PROJECT
OF HAMLINE UNIVERSITY
SCHOOL OF LAW

By: /s/ Kenneth E. Tilsen
Kenneth E. Tilsen
Hamline University
School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 644-1744

/s/ Cornish F. Hitchcock
Cornish F. Hitchcock
Public Citizen
Litigation Group
2000 P Street, N.W.,
Suite 700
Washington, D.C.
20036
(202) 833-3000
Attorneys for Plaintiff

Dated: 23 September 1994

(5)

No. 95-1608

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and JOAN ANDERSON GROWE, Secretary of the State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONERS

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

PETER M. ACKERBERG
Assistant Attorney General
1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
(612) 282-5712

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

68 pp

QUESTION PRESENTED

Do a political party's associational rights under the First and Fourteenth Amendments require a state to permit multiple-party candidacies on its election ballot?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 73 F.3d 196. The opinion of the district court (Pet. App. 12-25) is reported at 863 F. Supp. 988.

JURISDICTION

The court of appeals entered its judgment on January 5, 1996. The petition for a writ of certiorari was filed on April 4, 1996, and was granted on May 28, 1996. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1 provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 204B.04, subd. 2 (1994) provides:

> No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.12, subdivision 4.

Minn. Stat. § 204B.06, subd. 1(b) (1994) provides:

> An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:
>
> . . .
>
> (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election. . . .

STATEMENT OF THE CASE

Respondent Twin Cities Area New Party ("New Party"), a minor political party under Minnesota law, sued petitioners[1] ("State") in August, 1994, in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 27.

In Minnesota, minor-party candidates are nominated by petition, unlike major-party candidates who are nominated by primary election. Minn. Stat. § 204B.03 (1994). The petition for a minor-party candidate for a state legislative seat must be signed by at least 500 eligible voters or ten percent of the total number of voters in the legislative district at the last preceding state or county general election, whichever is less. Minn. Stat. § 204B.08, subd. 3(c) (1994). Candidates of four minor parties appeared on the 1994 Minnesota general election ballot, including one – the Independence (now Reform) Party – which achieved major-party status as a result of the election. Affidavit of Peter M. Ackerberg, Eighth Cir. Docket Sheet No. 11 (number of minor parties); Election Division, Secretary of State, *The Minnesota Legislative Manual: 1995-96*, at pp.

[1] Petitioners McKenna and Growe are county and State election officials, respectively. Pet. App. 27-28.

368-89 (1995) (showing Independence Party candidate for U.S. Senate received required vote distribution and percentage for major party status pursuant to Minn. Stat. § 200.02, subd. 7(a) (1994)).

The New Party sought to nominate incumbent State Rep. Andy Dawkins in 1994 as its candidate for a seat in the Minnesota House of Representatives. Pet. App. 28. Rep. Dawkins was also an unopposed legislative candidate for the same House seat in the primary election of the Minnesota Democratic-Farmer-Labor Party ("DFL"), one of the State's major parties. *Id.* at 27-28. He was thus assured of being the DFL nominee. *Id.* at 2.

The two provisions of Minnesota law at issue here prohibit candidates for election from appearing on the general election ballot more than once. Minn. Stat. § 204B.04, subd. 2 (1994) provides:

> No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.12, subdivision 4.

In addition, Minn. Stat. § 204B.06, subd. 1(b) (1994), requires that an affidavit of candidacy must state, *inter alia*, that the candidate "[h]as no other affidavit on file as a candidate for any office at the same primary or next ensuing general election. . . . "[2] Accordingly, election officials rejected the New Party's attempt to place Rep. Dawkins on the general-election ballot as the New Party nominee because he had previously filed as a candidate for the DFL nomination. Pet. App. 2.

[2] Minnesota has prohibited multiple-party candidacies since 1901. *See* Act of April 13, 1901, ch. 312, 1902 Minn. Laws 524.

Minnesota is not alone in its electoral policy of prohibiting multiple-party candidacies on the ballot. Multiple-party nominations, also known as cross-filing, cross-nomination or fusion, is prohibited by most states in some manner. A compilation of relevant state statutes is provided as Appendix A to this brief.[3]

Seven states permit some form of ballot fusion. See Appendix A.[4] New York is apparently the only state where cross-nomination continues to be a significant electoral factor. *Cf.* L. Sandy Maisel and Charles Bassett (eds.), "Cross-Endorsement Rule," 1 *Political Parties & Elections in the United States: An Encyclopedia* 218 (1991) (citing reasons why fusion not widely used where permitted in Vermont and Connecticut). See also pp. 21-22, *infra*.

In August, 1994, the New Party filed this action challenging, as applied, the constitutionality of the ballot fusion statutes as violations of the party's rights to associate protected under the First and Fourteenth Amendments. The party moved for a preliminary injunction, seeking to have the district court enjoin the defendants from refusing to place the name of Rep. Andy Dawkins on the November, 1994, general election ballot as the candidate of the New Party. The State opposed the motion and asked the district court to grant summary judgment for it. Pursuant to agreement of the parties and order of the district court, the motion for preliminary

---

[3] Appendix A is based on information contained in Note, *Fusion Candidacies, Disaggregation, And Freedom Of Association*, 109 Harv. L. Rev. 1302, 1303-04, n.14 (1996) (compiling statutes) (hereinafter "*Fusion Candidacies*").

[4] The law review compilation concludes that New York, Oregon, Vermont and Utah "appear on the face of their statutes to allow fusion" and that "Arkansas, Connecticut and Idaho neither expressly provide for fusion candidacies nor expressly ban them." *Fusion Candidacies*, 109 Harv. L. Rev. at 1303-04, n.14.

relief was consolidated with the motion for summary judgment.

In support of its challenge, the New Party offered a written declaration of Walter Dean Burnham, a professional political scientist. Declaration, para. 1; Joint Appendix ("J.A.") 11. He stated, among other things, that extensive regulation of political parties, which effectively began in the 1890s, was often crafted to limit the role of parties, especially third parties. *Id.*, para. 8; J.A. 13-14. Most state legislatures enacted one measure or another that outlawed multiple-party nominations, Mr. Burnham asserted. *Id.*, para. 10; J.A. 15. In addition, he stated his view that in New York, where multiple-party candidacies are allowed, the practice "has permitted electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in the selection of mainstream candidates." *Id.*, para. 11, J.A. 15.

The district court granted the State's summary judgment motion, relying in part on *Swamp v. Kennedy*, 950 F.2d 383 (upholding Wisconsin ban on cross-filing), *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992). Pet. App. 21-22, 25. The court first rejected the State's argument that resolution of the case is governed by *Storer v. Brown*, 415 U.S. 724 (1974). Pet. App. 18-19. The district court characterized *Storer* as a challenge to a "sore loser" statute designed to prevent intra-party squabbles from being waged by self-described "independents" in the general election. *Id.* at 19. In contrast, as the district court noted, Rep. Dawkins was not a sore loser but rather a "willing participant" in an effort to be nominated by both the DFL and the New Party. *Id.*

Instead of relying on *Storer*, the district court reviewed the State's fusion ban under the legal analysis set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Pet. App. 17, 19-24. First, in considering the "character and magnitude" of the restriction, the district court concluded that prohibiting cross-filing is not a "severe" restriction but a "minimal burden" on the New Party's First Amendment rights. *Id.* at 23. The district court noted that the cross-filing ban does not prevent the New Party from nominating a candidate. *Id.* at 20. Instead, the ban merely prevents New Party followers from "hitching their political cart to another party's star." *Id.*

The court then addressed the second part of the *Anderson* test by identifying and evaluating the precise State interests advanced for the restriction. *Id.* at 21-22. It found the State's interest in avoiding voter confusion and seating candidates who win at least a plurality of votes as a party's nominee to be compelling. *Id.* at 22. The court reasoned that the appearance of a candidate's name more than once under different party labels would result in voter confusion, if not create the appearance of unfairness. *Id.*

Weighing the minimal burden imposed by the cross-filing ban on the New Party's First Amendment rights against the interests advanced by the State for the ban, the court concluded that the cross-filing ban "is a valid and non[-]discriminatory regulation of the electoral process." *Id.* at 23. The court also stated that the cross-filing ban would be upheld even under the "stricter scrutiny" required of election statutes that, unlike those at issue, exclude a party or candidate from the ballot. *Id.* at 24. Finally, the court added that the mechanics of choosing candidates and counting votes is best left to legislative determination. *Id.* at 24-25.

The Court of Appeals for the Eighth Circuit reversed the district court. It held that the ballot fusion ban imposes a "severe" burden on the New Party's associational rights because "[t]he New Party cannot nominate

its chosen candidate when the candidate has been nominated by another party," *id.* at 5, and "because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." *Id.* at 6. The cross-filing ban was characterized as hindering the New Party's effort to establish itself as a "durable, influential player in the political arena" by forcing it "to make a no-win choice." *Id.* The court remarked that in the absence of cross-filing, "New Party members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all." *Id.*

In ruling that the State's ban on cross-filing "is broader than necessary to serve the State's interests . . . ," *id.*, the court of appeals reasoned that major party splintering is curable by requiring the major party's consent for multiple nominations, and voter confusion can be remedied by simple ballot instructions. *Id.* at 7-8. The remaining State concerns – the potential problem of overcrowded ballots and uncertainty about how to determine the winning candidate – were dismissed as "simply unjustified." *Id.* at 9. The court of appeals stated that the State's concern about ballot overcrowding is sufficiently satisfied by statutory requirements for a candidate to demonstrate minimal support before being placed on the ballot. *Id.* The court added that the State's concern with counting ballots to determine the winning candidate is not advanced by banning multiple-party nominations. *Id.* The court of appeals found nothing remarkable about aggregating votes cast for a candidate appearing on the ballot as the nominee of more than one political party. *Id.*

The court acknowledged that its decision conflicts with *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991)

(upholding Wisconsin cross-filing ban), *cert. denied*, 505 U.S. 1204 (1992); Pet. App. 10. It noted that the *Swamp* court did not decide whether Wisconsin's law could have been more narrowly tailored. *Id.* The Eighth Circuit concluded that Minn. Stat. §§ 204B.04, subd. 2 and 204B.06, subd. 1(b), are unconstitutional as violations of the New Party's associational rights. *Id.*[5]

The State filed a petition for a writ of certiorari seeking review of the Eighth Circuit's ruling striking down its statutes. The Court granted the petition.

SUMMARY OF ARGUMENT

This case tests the extent to which states must frame their election laws, and their election ballots in particular, to maximize opportunities for minor political parties to have a significant impact. Minnesota, like all but a handful of states, does not allow a candidate for elective office to appear on the ballot as the candidate of more than one party. In this case, the State's ban on multiple-party candidacies prevented the Respondent New Party from having a line on the general election ballot as an additional party sponsor of Rep. Andy Dawkins, a Democratic-Farmer-Labor legislator, who was already on the ballot as the DFL candidate. The New Party asserts, and the Eighth Circuit agreed, that the State's ban on multiple-party candidacies violates the party's First and Fourteenth Amendment rights to political association.

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[5] The Minnesota Legislature enacted a statute permitting some minor parties to cross-nominate in response to the Eighth Circuit decision. Act of April 2, 1996, ch. 419, 1996 Minn. Laws 979, *reprinted in* Appendix B to this brief. The Act expires and the prior fusion ban is revived if the decision below is reversed. *Id.* at § 10, 1996 Minn. Laws 982; App. B at B-5.

The Court applies a balancing test to challenges to state regulations in the election arena that first carefully evaluates the actual impact of the regulation on protected First Amendment activity. It is important to recognize that the First Amendment protects the associational interests of political parties, not because of any inherent First Amendment value in political parties per se, but only to the extent that parties serve core First Amendment values. The right to associate for the advancement of shared values is central to the First Amendment's protection of political parties. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Another core First Amendment value is fostering diversity in the marketplace of ideas. This value is reflected in the Court's ballot access cases that emphasize the importance of minor parties as vehicles for enhancing that diversity by providing alternative candidates. *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

The ban on ballot fusion does not impair the party's associational rights in any way that affects these core First Amendment values. New Party members can associate freely for the advancement of their shared goals, whether it be in support of Rep. Dawkins or any other candidate they choose as best representing their political philosophy. They can work for that candidate and ultimately vote for that candidate, because the challenged law keeps no candidate off the ballot. Furthermore, by encouraging minor parties to put new and different candidates on the ballot, the ballot fusion ban fosters diversity of political debate and enhances that core First Amendment value.

The circuit court did not focus on the impact of the ballot fusion ban on core First Amendment values, but on a claimed right of the party to select its standard bearer. Neither *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), nor Justice Scalia's dissent

in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the two cases cited by the Eighth Circuit, support the right asserted by the New Party to have a candidate listed on the ballot as its own when that candidate is already on the ballot as the candidate of another party.

The court of appeals also found support for the New Party's position in a right to broaden party participation, derived from language in *Tashjian* and *Norman v. Reed*, 502 U.S. 279 (1992). However, in each of those cases the challenged law restricted the growth of the party regardless of their popular support. The fusion ban does not impede anyone from associating with the New Party nor impose limits on the breadth of its development. The party's development is limited not by the law but by its lack of popular support.

The party wants the State to reconfigure its ballot not so that the party members can vote for the candidate of their choice – that candidate is already on the ballot. Rather, the New Party seeks *another* ballot position for that candidate so that it can demonstrate through the ballot the support it provided for that candidate. This misconceives the purpose of the ballot, which this Court has emphasized is to elect public officials, not to serve an expressive function. *Burdick v. Takushi*, 504 U.S. 428 (1992).

The Court has not required the government affirmatively to enhance opportunities for exercise of First Amendment rights. There is no good reason to do so now in the electoral arena. On the contrary, recognition of a right to demand an electoral system that maximizes minor parties' opportunity for success could require additional changes to vindicate that right, ranging from including a summary paragraph about the party on the ballot to requiring a system of proportional representation in a place of the current winner-takes-all approach.

Even if there were thought to be some impairment of core First Amendment values as a result of the ballot fusion ban, it could only be characterized as minimal when compared with the Court's ballot access cases in which state regulations precluded a party from having *any* candidate on the ballot. *Storer v. Brown*, in particular, imposed restrictions similar in nature but more stringent in effect, yet the Court upheld the California disaffiliation law at issue.

Finally, the ballot fusion ban serves several state interests in the integrity of the electoral system that this Court has consistently held are important, and even compelling. The ban avoids lengthy, complex ballots and thereby averts voter confusion. The regulation limits manipulation of the ballot that would turn it into a billboard for sloganeering or single issue politics. It helps to control factionalism and party splintering that the Court has recognized as dangers to an effective political system. These important governmental purposes outweigh any minimal burden on associational interests that the fusion ban imposes, and the decision of the Eighth Circuit that the law is unconstitutional was therefore wrong.

ARGUMENT

I. THE NEW PARTY'S CHALLENGE TO THE MINNESOTA BALLOT FUSION BAN IS SUBJECT TO A BALANCING TEST THAT MEASURES THE EXTENT OF IMPAIRMENT OF FIRST AMENDMENT RIGHTS AGAINST THE STATE INTERESTS SERVED BY THE BAN.

Challenges to state election laws concern the conflict of two important opposing interests. As the Court has often pointed out, "[t]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively . . . rank

among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). On the other hand,

> [c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Burdick v. Takushi, 504 U.S. 428, ___, 112 S. Ct. 2059, 2063 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Because of the importance of the competing interests, the Court has acknowledged time and again that there can be no litmus-paper test to resolve these conflicts. Instead, the Court:

> must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights. . . . "

Burdick, 504 U.S. at ___, 112 S. Ct. at 2063 (citations omitted).

Realizing also that each provision of an election code "inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends[,]" *id.* at 2063, the Court has rejected application of strict scrutiny and a requirement of narrow tailoring for every election regulation. Instead, the Court has stated:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance. . . . " *But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.*

Id. at 2063-64 (emphasis added; citations omitted).

Application of this analytical construct to the instant case demonstrates, first, that the Minnesota ban on ballot fusion does not impair the New Party's right of association in any significant way. Second, the ballot fusion ban serves important state interests in a fair and orderly election process. Finally, because the law imposes at most minimal, reasonable, nondiscriminatory restrictions on First and Fourteenth Amendment rights, the important state interests outweigh any minimal burden that is imposed.

II. FIRST AMENDMENT RIGHTS ARE NOT IMPAIRED BY STATE LAWS THAT DO NOT ALLOW A CANDIDATE TO APPEAR ON THE GENERAL ELECTION BALLOT AS THE CANDIDATE OF MORE THAN ONE PARTY.

The central thesis of the New Party's argument, and of the ruling of the court below, is that the party's associational rights under the First Amendment include not only the right to select the standard-bearer of its choosing, but also, significantly, to have the candidate identified as such on the state's election ballot, even if the same candidate is also on the ballot as the candidate of another party. Moreover, the New Party would expand the

asserted right a step further, by assuming that the candidate and the party will have a separate line on the ballot such that voters can vote for the candidate as the candidate of the New Party and not as the candidate for the other party.[6] Additionally, the New Party and the Eighth Circuit believe the party has a protected First Amendment right to develop and grow through alliances with other parties, particularly in the form of sponsoring the same candidate on the election ballot. The Eighth Circuit held that because these rights are frustrated by the ballot fusion ban, it imposes a significant burden on the party's First Amendment rights that is not outweighed by the State's interests. However, nothing in this Court's jurisprudence or in the values that the First Amendment is intended to protect support this expansive interpretation of the freedom of association. In reality, the ballot fusion ban has no adverse impact on the legitimate associational rights of the New Party.

A. The Associational Rights Of Political Parties Reach Only As Far As The Core First Amendment Values They Are Intended To Serve.

There is, and can be, no dispute that this Court has held that the freedom of association implicit in the First Amendment extends to political parties. *E.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). However, none of these cases have held that there is a First Amendment value in political parties as such.

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[6] Contrary to this assumption, a state law can permit multiple party candidacies, satisfying a party's desire to have the candidate of another party also appear on the ballot as its own, without providing the candidate with multiple ballot positions. Instead, the law could provide that the candidate's name and all the nominating parties must appear together in one ballot position.

Rather, political parties enjoy First Amendment protection because they are a vehicle through which individuals can exercise their First Amendment right to associate for the advancement of shared beliefs. Similarly, the cases that recognize First Amendment protection for minor political parties do not articulate a constitutional interest in the existence or the success of minor parties *per se*. Instead, the First Amendment value in minor parties is the contribution they provide to the diversity of political speech, the marketplace of ideas that is central to the First Amendment notion of free speech, through the offering of alternative candidates. Thus, it is the preservation of these core First Amendment values that drives this Court's decisions, not the advancement of political parties in general, or minor parties in particular.

The core First Amendment principle of the right to associate for the advancement of shared beliefs is at the heart of the cases that acknowledge a political party's right of association. In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down state laws that imposed significant restrictions on minor party access to the ballot because the laws "place[d] burdens on . . . the right of individuals to associate for the advancement of political beliefs. . . . " 393 U.S. 23, 30 (1968). This same central value is found in cases involving political party governance. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the Court addressed a dispute concerning the extent to which a state could interfere in a national political party's decision on which of two competing slates of delegates to seat at its national convention. In affirming the party's autonomy, the Court explained:

> The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs

> and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

Id. at 487 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)). These principles were reiterated in another case, concerning a state law that attempted to regulate the voting of convention delegates, *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981). The Court again stated:

> This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. . . . And the freedom to associate for the "common advancement of political beliefs," . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

Id. at 121-22 (citations and footnote omitted). The Court again recognized the core "freedom to engage in association for the advancement of beliefs and ideas" in upholding the right of a party to open its primary election to non-party members despite a state law that did not permit "open" primaries. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). *See also Colorado Rep. Fed. Campaign Comm. v. F.E.C.*, ___ U.S. ___, ___, 64 U.S.L.W. 4663, 4670 (U.S. June 26, 1996) (Kennedy, J., dissenting) ("Political parties . . . exist to advance their members' shared political beliefs.").

Similarly, the core First Amendment value of diversity in political debate reverberates through the Court's election law cases. Thus, in a challenge to ballot access restrictions in Ohio's statutes, the Court emphasized that "[c]ompetition in ideas and governmental policies is at

the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). In a subsequent challenge to Ohio's ballot access restrictions, the Court made clear the connection between the value of diversity of candidates and the competition in ideas: "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794. This concern translated directly into an emphasis on the importance of presenting a diverse field of candidates to the voters:

> *Our primary concern is with the tendency of ballot restrictions "to limit the field of candidates from which voters might choose."* Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."

Id. at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (emphasis added).

In summary, while the Court's cases addressing state restrictions on access of political parties to the ballot and otherwise regulating party activities acknowledge party rights of association, the underlying source of these rights is core First Amendment values. It is not the advancement of the party that requires recognition of party rights, but the bedrock principles of fostering competition of ideas and of permitting association for the advancement of those ideas.

B. The Minnesota Ban On Multiple-Party Candidacies Does Not Burden First Amendment Rights.

In evaluating a challenge to state election laws, a court must first ascertain "the character and magnitude

of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. . . . " *Burdick v. Takushi*, 504 U.S. 428, ___, 112 S. Ct. 2059, 2063 (1992) (quoting *Anderson*, 460 U.S. at 789). The Eighth Circuit applied the correct methodology, first undertaking this inquiry into the extent of the burden on the New Party's First Amendment rights. However, it reached the wrong conclusion, deciding that "[t]he burden on the New Party's associational rights is severe." Pet. App. 5.

As demonstrated *infra*, the court erred because it failed to evaluate the impact of the State's ballot fusion ban on the core First Amendment values on which this Court's decisions are founded. As a result, the Court construed more broadly than warranted two specific aspects of political parties' associational rights alluded to by this Court. Those associational rights were, first, the right "to select a standard bearer who best represents the party's ideologies and preferences," *id.* (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)), and second, the right to "broaden the base of public participation in and support for [the party's] activities." *Id.* (quoting *Tashjian*, 479 U.S. at 214).

1. The ban on ballot fusion does not interfere with core First Amendment values.

The Eighth Circuit did not discuss at all the impact of Minnesota's fusion ban on the core First Amendment values that give rise to those associational rights that political parties enjoy. Had it done so, it would necessarily have concluded that there is no burden on those rights.

One of the core interests is the ability of individuals to associate for the advancement of shared beliefs. Nothing in the Minnesota law impairs the ability of New Party

members to engage in this kind of protected group activity. The party can identify issues that it wishes to address and on which its members share common beliefs. It can engage in political speech to advance its members' shared views on those issues. The party can select a candidate who best represents the membership's views. It can identify that candidate as the choice of the party for office; it can work for his or her election by raising money and campaigning for the candidate. Ultimately, party members can vote for the candidate. The members of the New Party can participate in all the collective political activity that the First Amendment protects.

The only limitation imposed by the fusion ban is that if the party members select as their preferred candidate a person who will already be on the ballot as the candidate of another party, the New Party name will not appear on the ballot with their chosen candidate. The effect, if any, of this restriction on members' ability to associate for the advancement of shared beliefs is minuscule.

The second core First Amendment value on which party rights are ultimately grounded, especially those of minor parties, is the interest in diversification of choices to enhance the marketplace of ideas. As applied to the New Party, the Minnesota ban on ballot fusion has no negative impact on this value. In fact, the concept of ballot fusion undermines this core value by reducing the variety of candidates that otherwise might be available to voters if each party chose a separate candidate.

Significantly, the law challenged here does not have the same effect as those attacked in cases such as *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Bullock v. Carter*, 405 U.S. 134 (1972). In those cases, filing deadlines, filing fees and other state-imposed restrictions precluded independents and minor parties from placing candidates on the ballot,

thus reducing the choices available to voters. The important adverse consequence for First Amendment purposes, as explained by the Court, was that "such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794. Unlike the plaintiffs in cases such as *Anderson*, *Williams*, and *Bullock*, and unlike most minor political parties in Minnesota, the New Party did not seek to enrich political discussion by nominating its own candidate to present its own political viewpoint to the public. Instead, the New Party sought to offer as its candidate a very popular political figure who was already on the ballot as the candidate of another, established party. This would have done nothing to enhance the choice of candidates available to voters. Nor does it in reality present additional ideas to the voters. It can hardly be said that Rep. Dawkins would meaningfully represent one set of positions to the voters as the candidate of the DFL party and a different set of positions to the voters as the candidate of the New Party.

Contrary to the conclusion of the court below, the state prohibition on ballot fusion does not seriously impair the basic First Amendment values that the associational rights of political parties are intended to serve. A ban on fusion candidacies does not interfere with the ability of party members to associate for the advancement of shared ideas, nor does it have any genuine negative effect on the diversity of candidates available to voters. Accordingly, the court of appeals should have concluded that the ballot fusion ban imposes no burden on First Amendment rights of the New Party.

2. The Minnesota ballot fusion ban does not impair any legitimate right to select a party standard bearer.

In concluding that the ban on fusion candidacies severely impairs the New Party's associational rights, the court of appeals did not address the effect on core First Amendment values, but evaluated the impact on two more specific "party" rights. The first was the right of a political party " 'to select a standard bearer who best represents the party's ideologies and preferences.' " Pet. App. 5 (citation omitted). The court deemed this right severely burdened because "[t]he New Party cannot nominate its chosen candidate when the candidate has been nominated by another party despite having the candidate's and the other party's blessing." *Id.*[7] As applied in this case, the court of appeals construed that right to select a standard bearer as entitling the New Party not only to select as its candidate the candidate of another party, but also to have that candidate appear on the ballot as the candidate of the New Party (as well as the candidate of the other party). In addition, the court's rationale assumes that the candidate will appear on a separate line on the ballot for each party that nominated him. The cases relied on by the court and the New Party do not establish such a right.

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[7] It is worth noting that there is no basis in the record for the court's factual statement that the New Party had "the other party's blessing." The court was correct in stating that "[t]he DFL did not object to the New Party's nomination of Dawkins." Pet. App. 2. However, the absence of DFL objection should not be construed as support. There was no opportunity or reason for the DFL to make such an objection because the law prohibited the dual candidacy and the nominating petition of the New Party was therefore rejected by the county election officials.

To be sure, common sense dictates that the associational rights of political parties must include some degree of freedom to choose the candidates with whom the party members will associate. Nevertheless, neither the decisions of this Court nor the legal principles on which they are based require that the right to select a party's candidate requires that the state put that candidate on the ballot more than once, as the candidate of multiple parties.

The court of appeals relied first on *dicta* from this Court's opinion in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989). That case involved a significantly different type of state regulation than is at issue here. The California law challenged in *Eu* prohibited the party, as an organization, from supporting and endorsing any candidates in its primary election. The Court held that this muzzling of the party violated its right of free speech because it "directly hamper[ed] the ability of a party to spread its message and hamstr[ung] voters seeking to inform themselves about the candidates and the campaign issues." *Id.* at 223. The Court added that the party's right to associate was also burdened by the prohibition. Justice Marshall, writing for the Court, stated:

> *Freedom of association means* not only that an individual voter has the right to associate with the political party of her choice, [citations omitted] but also *that a political party has a right* to " 'identify the people who constitute the association,' " [citations omitted] and *to select a "standard bearer who best represents the party's ideologies and preferences." Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933 (1976).

Eu, 489 U.S. at 224 (emphasis added). The Court explained that the law interfered with associational rights because it imposed restrictions on "individuals wishing to band together to advance their views [the party organization] . . . , while placing none on individuals [individual members of party central committees]." *Id.* at 224-25.

The language in *Eu* about selection of a standard bearer does not establish, or even suggest, the expansive right asserted by the New Party. *Eu* involved regulation of the party's internal candidate selection process that silenced the party completely with regard to candidates in the primary. Nothing in the Minnesota law has any such effect. The New Party remains free to choose a "standard bearer who best represents the party's ideologies and preferences," and to endorse, support and campaign for that candidate, even if that person is also the candidate of another party.[8] The only limitation is that if the New Party selects someone who is already the candidate of another party, the candidate cannot appear on the general election ballot as the candidate of both parties. Nothing in *Eu* suggests that this result interferes with the party's associational rights.[9]

The Eighth Circuit also cited Justice Scalia's reference to the right of a party to select its standard bearers in his

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[8] Indeed, this ability to endorse, support and campaign for a candidate was precisely what the party was prohibited from doing at the primary stage in *Eu*.

[9] Nor does the case from which Justice Marshall borrowed the "standard bearer" quotation support the New Party's position. Like *Eu*, neither the *Ripon Society* case, which was about the validity of the party's convention delegate selection process, nor Judge Tamm's concurring opinion which Justice Marshall quoted, said anything about a party's right to have its chosen candidate appear on the ballot even if he was already on the ballot for another party.

dissent in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 234 (1986). Like *Eu*, *Tashjian* involved a question about the process by which a political party selected its candidates. The Republican Party of Connecticut wanted to change its rules so that individuals who were not members of the party could vote in its primary elections, but state law did not permit such "open" primaries. *Id.* at 210-11. The Court held that the state could not restrict the party's choice of who could participate in its primaries, explaining that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224.

Justice Scalia, joined by the Chief Justice and Justice O'Connor, dissented. *Id.* at 234. Justice Scalia reasoned that the minimal relationship between the Republican Party and an individual who refused to join the party and whose only contact with the party was to vote in its primary should not qualify as an association deserving of constitutional protection. *Id.* at 235. Justice Scalia contrasted with this casual contact the "ability of members of the Republican Party to select their own candidate" which, he wrote, "unquestionably implicates an associational freedom," but was not burdened there. *Id.* at 235-36. Accordingly, Justice Scalia's reference to the right of a party to select its candidates says nothing about the right asserted here – to select the candidate of another party and have that candidate appear on the ballot as the candidate of two (or more) parties.

The Eighth Circuit decision expands the right of a political party to select a standard bearer beyond anything this Court has recognized. More importantly, such an expansive right is not necessary to preserve the core First Amendment values from which a party's associational rights arise.

3. The ballot fusion ban does not impair a properly construed right of a party to broaden its support.

The Eighth Circuit opined that a second aspect of the New Party's associational rights was affected by the ballot fusion ban. First the court identified the right: "Parties also have an associational right to 'broaden the base of public participation in and support for [their] activities,' *Tashjian*, 479 U.S. at 214." Pet. App. 5. It then concluded that right was severely burdened "because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." Pet. App. 6.

The flaws in the court's conclusion are illuminated by an understanding of the basis for the New Party's contention that a fusion ban interferes with its right to broaden the base of public support. The New Party argues that third parties cannot attract and maintain public support unless they can elect candidates to office. It asserts that third parties can overcome this obstacle only by nominating popular candidates of major parties as their own and having their own separate line on the ballot for that candidate. The court of appeals apparently agreed, stating:

> When a minor party and a major party nominate the same candidate and the candidate is elected because of the votes cast on the minor party line, the minor party voters have sent an important message to the candidate and the major party, which gets attention for the minor party's platform.

Id.

As explained in more detail below, the court of appeals conclusion that the New Party's right to develop

alliances and broaden public support is severely burdened is wrong for numerous reasons. First, it is based on a dubious generalization that without fusion third parties cannot succeed and with it they will. Second, it expands a political party's right to broaden its public support far beyond the bounds established by this Court. Finally, it misconceives the function of the election ballot as a means of measuring party support rather than of electing public officials. This misconception transforms the right of a political party to seek to expand its public support without unjustified government restrictions into an obligation on the state to maximize the opportunities for third party success.

Contrary to the court's apparent conclusion and the New Party's argument, ballot fusion is not the only, or necessarily the most effective, possible means of political alliance. The challenged laws do not prevent the New Party from forging short or long-term alliances with friendly rival parties by merger[10] or cooperation. The New Party may pool its campaign funds and workers with other parties, negotiate agreements not to field opposing candidates and jointly campaign for the same candidate.

Citing a law review note,[11] the court appears to accept the New Party's thesis that the decline of third parties was largely attributable to the enactment of fusion ban legislation at the turn of the century and that in the absence of fusion bans, minor parties will thrive and eventually be able to elect their own candidates to office. Neither of those propositions is necessarily accurate.

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[10] The DFL is the product of merged parties. *See generally* John E. Haynes, *Dubious Alliance* (1984).

[11] William R. Kirshner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683 (1995).

Several reasons other than fusion ban legislation have been suggested for the decline in the role of minor parties. For example, one writer opines that "[t]he direct primary and the decentralization of party authority, then, have virtually eliminated the need for third parties as instruments for expressing dissident views in state politics." Howard R. Penniman, "The Party Structure" in *The Party Symbol: Readings On Political Parties* 101, 105 (William Crotty ed., 1980). *See also* Declaration of Walter Dean Burnham, para. 6 ("It is well known that such first-past-the-post or winner-take-all electoral regimes create formidable barriers to the electoral viability of third parties."), J.A. 13; Steven J. Rosenstone, et al., *Third Parties In America: Citizen Response To Major Party Failure* 19-25 (1984) (identifying ballot access restrictions, not including fusion bans, that make minor party success difficult). In addition, there is no evidence in the record (or elsewhere as far as Petitioners know) that fusion bans prevent third parties from gaining sufficient political strength to win state legislative seats on their own. Thus, in Alaska and New Hampshire, where fusion is banned, a minor-party candidate served in the respective state Houses as of April 1996. The Council Of State Governments, 31 *The Book Of The States* Table 3.3 at 68 (1996-97 ed.).

Nor is the converse proposition – that where fusion is permitted, minor parties will thrive – unassailable. All of the examples of the success of third parties where fusion is permitted cited by the New Party, the Eighth Circuit and the sources they rely on come from New York. However, fusion is permitted, or at least not prohibited, in seven states.[12] In six of those states, Arkansas, Connecticut, Idaho, Oregon, New York and Utah, there were no

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[12] Those states are Arkansas, Connecticut, Idaho, Oregon, New York, Vermont and Utah. See note 4, *supra*.

third-party legislators in April 1996. *Id.* Furthermore, electoral history available for elections from 1972 to the present demonstrates that of the states that permit fusion, New York is the only one in which multiple party candidacies occur with any frequency. Specifically, in the six fusion states other than New York, in the elections for governor, United States Senator and U.S. Representative from 1972 through 1994, only four candidates have run on the ticket of more than one party.[13] *See* Michael Barone, Grant Ujifusa, et al., *The Almanac of American Politics 1976* (1975) and similar volumes by the same authors for the years 1978, 1980, 1982, 1984, 1986, 1988, 1990, 1992, 1994 and 1996. Obviously, the absence of a ban on cross-filing in those states has not resulted in any significant ballot fusion activity in all those elections. Thus, it appears that New York is simply an anomaly that does not represent the typical result where fusion is permitted. The Court should not establish a constitutional mandate to permit ballot fusion that would require some forty states to abandon their long-standing laws, on the theory that fusion is a necessary and sufficient ingredient for the success of third parties based on anecdotal evidence from only one state.

The court of appeals was also mistaken in its interpretation of the scope of a political party's right "to broaden the base of public participation." Pet. App. 6.

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[13] Those four candidates were: one for U.S. Senator and three for U.S. Representative in the 1992 election in Connecticut. The candidates each ran as the nominees of both the Democratic Party and the A Connecticut Party. The latter party was the third party formed by former Senator Lowell Weicker for his run for governor of the state and was named so it would appear first alphabetically on the ballot. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1994*, at 237, 242, 245, 248, 250 (1993).

The court misconstrued this Court's cases concerning that aspect of party associational rights, and as a result erroneously concluded that the New Party's rights were severely impaired by the ban on ballot fusion.

The Eighth Circuit relied on the "broaden the base of public participation" language found in *Tashjian v. Republican Party Of Connecticut*, 479 U.S. 208, 214 (1986). As discussed above, that case was a challenge by the Republican Party to a state law that prohibited the party from holding an open primary, that is, one in which people not registered as party members could vote. The party wanted to open its primary so that it could attract the support of independents, who formed a large proportion of the state's voters. *Id.* at 212. This was the nature of the attempt "to broaden the base of public participation in and support for" the party's activities to which the Court in *Tashjian* referred. The Court explained that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' " *Id.* at 214 (quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981)). Thus, the associational freedom at issue was the ability to open up the party's candidate selection process to an additional category of voters from whom to seek support and with whom potentially to share political beliefs. The state law had the effect of preventing the party from redefining the participants in its nominating process, and no matter how much support those voters would provide, they could not participate in the party function because of the state restriction.

The other case relied on by the court of appeals was *Norman v. Reed*, 502 U.S. 279 (1992). In Norman, the Harold Washington Party became an "established political party" in the City of Chicago by getting more than 5%

of the vote in elections. *Id.* at 283. The following year supporters of that party who were located in the suburban areas of Cook County (in which the City of Chicago is located), attempted to run candidates under the same party name in suburban Cook County. *Id.* at 284. Even though the Harold Washington Party in the city had authorized the use of its name, the Illinois Supreme Court held that use of that name in the suburbs was barred by a state statute prohibiting a "new political party" from using the same name as an "established political party." *Id.* at 286-87. The Court acknowledged that its cases had recognized the "right of citizens to create and develop new political parties." *Id.* at 288.[14] The Court held that the law would "obviously foreclose the development of any political party lacking the resources to run a statewide campaign." *Id.* at 289. This was so because the effect of the law was to prevent a small party from expanding from one geographic area into another without changing its name. *Id.* Because that severe impact was not justified by a sufficient state interest, the law was struck down. *Id.* at 293-94.

Like the law in *Tashjian*, the law in *Norman* imposed a limit on the growth of the party that would operate regardless of popular support. In *Tashjian*, no matter how much support the Connecticut Republicans might find in the independent voters, the law precluded them from associating together in the primary. Similarly, in *Norman*, no matter how much support there was for the Harold Washington Party in suburban Cook County, the party could not expand there.

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[14] The Court explained that this right "advances the constitutional interest of likeminded voters to gather in pursuit of common political ends. . . . " 502 U.S. at 288. Therefore, this right to develop parties also is grounded in one of the core First Amendment values discussed above at 14-17.

In contrast, the Minnesota ban on ballot fusion imposes no such arbitrary limit on the development of the New Party. Unlike the circumstances in *Tashjian* and *Norman*, here the state law does not prevent anyone from associating with the New Party. The party can operate in any part of the state in which it can find supporters. It can nominate and support candidates in any part of the state. The party can invite any voter to join the party in its support of its favored candidates. The New Party's development is limited, if at all, only by its lack of popular support, not by state law.[15]

The New Party does not seek to eliminate a state law that prevents it from taking advantage of its own strength or naturally expanding its support. Rather, it wants the state to revise its ballot format so the party can take advantage of the strength of a candidate of another party. The New Party's and the circuit court's rationale is that the party can become a "durable, influential player in the

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[15] The Eighth Circuit relied on *Norman* for another point. The court rejected the suggestion that the burden on the New Party's rights is insignificant because the fusion ban only eliminates one possible candidate. Pet. App. 4-5. The court cited *Norman* in support of this rejection, apparently accepting the New Party's argument that since the party in *Norman* was free to use any other name, the situations are analogous. *Id.* at 6. They are not, however. The impact in *Norman* was far more severe. It meant that any party that wanted to grow gradually into additional geographic parts of the state would have to change names each time it expanded to avoid the ban on adoption of an existing name, thus risking confusion and loss of support in both the new area and in the established areas. In contrast, the ban on ballot fusion means only that party members must choose between voting for their preferred candidate, even though identified on the ballot with another party, and nominating another candidate who can appear on the ballot with their party name.

political arena," App. 6, only if it can demonstrate its strength at the ballot box, and it can do this only if it can appear on the ballot as the sponsor of popular, major party candidates. The court's conclusion that the state has a constitutional obligation to alter its ballot to enable this strategy fundamentally misconceives the purpose of the ballot and the extent of the state's obligations under the First and Fourteenth Amendments.[16]

In contrast to the approach of the Eighth Circuit, this Court has repeatedly stated that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates.' " *Burdick v. Takushi*, 504 U.S. 428, ___, 112 S. Ct. 2059, 2066 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). The Court expressly rejected "[a]ttributing to elections a more generalized expressive function." *Id.* Thus, the Court refused in *Burdick* to require Hawaii to provide for write-in voting where its ballot access laws were constitutionally adequate. The Court explained:

> In such situations, the objection to the specific ban on write-in voting amounts to nothing more than the insistence that the state record, count

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[16] Judge Ripple, in his dissent from the denial of rehearing en banc in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), relied on the same misconception of the ballot as a communication device. Foreshadowing the similar statement of the Eighth Circuit, Judge Ripple wrote:

> If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, *an important message has been sent* by the voters to both the candidate and to the major party.

Id. at 389 (emphasis added).

> and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system. . . . [W]e discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws.

Id. at 2067. See also *id.* at 2069 (Kennedy, J., dissenting) ("[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression"). There is, likewise, no constitutional obligation on the states to tailor their general election ballots to serve as polling mechanisms to gauge the relative strength of parties.[17]

What the New Party in reality argues for is a state obligation to structure its electoral system, and its election ballot in particular, in order to maximize the ability of minor parties to develop popular support. The First Amendment does not require the government to provide

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[17] Justice Scalia expressed a similar thought in *Tashjian*. In response to the argument that the Republican Party should be permitted to allow independent voters to participate in its primary so that it could offer candidates that would attract those voters in the general election, he stated:

> The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of support among Party members and independents combined. *The State is under no obligation, however, to let its party primary be used, instead of a party funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents.*

479 U.S. at 236 (Scalia, J., dissenting) (emphasis added). Nor should the State be obligated to provide separate line and party identification on its general election ballot so that a minor party can demonstrate its strength to the candidate, its own voters or others.

what may be the most effective way to exercise a protected right. Accordingly, the Court explained that "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)) (additions and deletions in Court's quotation). In *Regan*, the Court stated that the plaintiff lobbying organization did not have as much money as it wanted and therefore could not exercise its freedom of speech as much as it would like. *Id.* at 550. Nevertheless, the Court ruled that it was not entitled to a government subsidy in the form of tax breaks so that it could maximize its exercise of free speech. *Id.* at 551.

Here, the New Party lacks not money, but sufficient voter support to exercise as fully as it would like its right to participate in the electoral process. As in *Regan*, the state is not required to configure its ballot so that the New Party can overcome its shortcomings and maximize its political prospects. Although the Court has struck down unjustified impediments imposed by the state on a party's opportunity to grow, it has never suggested that the First and Fourteenth Amendments require states affirmatively to aid parties in their efforts to expand popular support. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986) ("States are not burdened with a constitutional imperative to . . . 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot."). Even the New Party agrees that "[t]he Constitution does not mandate the encouragement of minor parties. . . . " Brief For Plaintiff-Appellant filed in Eighth Circuit at 27.

Indeed, establishing a right to affirmative efforts by states to optimize the electoral environment for third

party success would lead far beyond elimination of fusion bans. For example, a minor party could argue that its ability to gather public support is contingent on having a short paragraph stating its principles on the ballot. The right created by the Eighth Circuit's decision could require that relief. On a broader scale, just as the Eighth Circuit accepted the political science theories adverse to fusion bans here, another court could accept the theory that the failure of third parties to thrive is the result of the institution of direct party primaries. Penniman, *The Party Symbol: Readings on Political Parties, supra*, at 105. Would states then have an obligation to modify those laws to make the system more amenable to third party success? Others have theorized that it is the "winner-takes-all" electoral system that provides the most significant barrier to third party success. Burnham Declaration, *supra*, para. 6, J.A. 13. A system of proportional representation would certainly be more hospitable to the election of third party candidates and the continued success of minor parties. That drastic change could also be argued as part of the constitutional mandate.

The right of parties to broaden their base of support should remain grounded in core First Amendment principles. It should not be expanded into an obligation to tailor election ballots to foster third party success.

C. The Ban On Multiple-Party Candidacies Is Less Restrictive Of First Amendment Values Than Statutes Upheld In Other Cases And Any Impairment Of Associational Rights Is Therefore Minimal.

Even if the Court were to conclude that there is some impairment of the New Party's associational rights from the ballot fusion ban, a proper focus on the core First Amendment values discussed earlier establishes that it is

minimal. This conclusion is reinforced by comparison of the challenged Minnesota fusion ban to more restrictive election laws that have been upheld. In upholding ballot access restrictions imposed by the state in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Court noted that the challenged statute was "more accommodating of First Amendment rights and values than were the statutes we upheld" in several prior cases. *Id.* at 198. Thus, it is appropriate to subject the ballot fusion ban to the same comparison.

As discussed above at 19-20, the Minnesota law is far less restrictive than statutes upheld by the Court that completely barred minor parties from the ballot. *E.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Bullock v. Carter*, 405 U.S. 134 (1972). Here, the New Party was eligible to put anyone of its choosing on the ballot as its own candidate, except Rep. Dawkins and his opponent. Moreover, Rep. Dawkins was on the ballot if New Party members wanted to vote for him as the candidate who best represented their views.

Storer v. Brown, 415 U.S. 724 (1974), is another persuasive illustration that Minnesota's regulation does not unconstitutionally burden First Amendment rights. The restrictions placed upon independent or minor party candidates by the California statutory scheme upheld in *Storer* were of the same type as the restrictions placed on the New Party by the Minnesota law, but the former were substantially more severe. Even in light of the more severe restrictions, the Court in *Storer* upheld the California law.

In *Storer*, the Court upheld the California ballot access law that forbade candidates from being nominated as independents in the general election if they had been registered as affiliated with a qualified political party

within one year prior to the primary election in that year. California Elections Code, § 6830(d) (Supp. 1974), reprinted in *Storer* appendix, 415 U.S. at 752.[18]

Two of the plaintiffs in *Storer* wanted to run for Congress in the 1972 general election as independents, but were barred because they were registered Democrats until January and March, 1972. *Id.* at 728. Plaintiffs challenged the disaffiliation statute on the grounds that it posed an unconstitutionally severe burden upon the right to vote and associate for political purposes under the First and Fourteenth Amendments. *Id.* at 729.

The disaffiliation statute upheld in *Storer* was far more restrictive of the rights of independent candidates or minor parties who wished to nominate candidates than the statutes at issue in this action. First, in California a minor party was barred from nominating not only a current candidate of another party, but anyone affiliated with any other party. This would have barred a minor party from considering thousands of possible candidates on the basis that they were registered members of the Democratic, Republican, or other parties. In this action, the New Party was barred from nominating only Rep. Dawkins and the other major party candidate already nominated for the same seat.

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[18] As noted by the Court, 415 U.S. at 733, a substantially equivalent provision provided that a candidate for partisan office on behalf of a party would be rejected if the candidate had been registered as affiliated with another political party within 12 months prior to the filing of the declaration of candidacy. California Elections Code, § 6401 (Supp. 1974), reprinted in *Storer* appendix, 415 U.S. at 752. In effect, this meant that a person affiliated with a political party who wanted to run as an independent or for another political party would have to disaffiliate from his original party approximately 17 months before the general election. 415 U.S. at 758 (Brennan, J., dissenting).

Second, in California a minor party might have to begin its search for a candidate more than 17 months before the general election to avoid the disaffiliation problem. In Minnesota, a minor party has until July of the election year to persuade a potential candidate affiliated with another party to be its candidate.

Finally, the California statute operated as "an absolute ban to candidacy" for many potential candidates. *Storer*, 415 U.S. at 737. In contrast, the statute at issue herein does not result in anyone being absolutely excluded from the ballot; it only bars Rep. Dawkins from being listed twice.

The extremely far-reaching nature of the restrictions upheld in *Storer* is illustrated by the views of the dissenting Justices that California's interests could just as easily be served by "less drastic means." Specifically, they suggested that the disaffiliation requirement be set closer to the primary date, rather than over a year earlier, and that it only apply to those potential candidates who had actually run in a party primary. *Id.* at 761-62 (Brennan, J., dissenting). These "less drastic means" are essentially what the Minnesota regulation requires. Those candidates who choose to run in a major party primary, such as Rep. Dawkins, are precluded from otherwise being on the ballot in the general election. Those candidates who choose to run as independents or as minor party candidates must choose to disaffiliate from a major party close in time to the primary.

In the instant case, the New Party has argued, and the district court agreed, that *Storer* is distinguishable because "the disaffiliation rule at issue in *Storer* was directed at 'sore losers' " and because Rep. Dawkins was not a sore loser, but "a willing participant." Pet. App. 19. *Storer* should not be read so narrowly. The statutes at

issue in *Storer* did have the legitimate purpose of preventing "sore loser" candidacies, in which a defeated primary participant runs in the general election as an independent or a minor party candidate in an effort to split his party's vote.[19] However, California's statutes applied to a far broader range of situations than the "sore loser" situation and were justified by compelling state interests other than the rationale of avoiding the "sore loser" scenario. *Storer*, 415 U.S. at 732-36.

Furthermore, the two plaintiffs in Storer were not "sore losers." They were simply Democratic Party members, rather than defeated Democratic Party primary participants. *Id.* at 728. Indeed, if the Court had upheld the disaffiliation statute solely or even primarily based upon the rationale of preventing sore loser independent candidates who threaten to factionalize and splinter their former party, it would have been difficult to rationalize applying the statute to the situation of the two plaintiffs.

This Court has never questioned the continuing validity of *Storer*, nor given any indication that it reads *Storer* as applying only to the "sore loser" situation. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court held that Ohio's early filing deadline for independent candidates for President placed an unconstitutional burden on that candidate and his supporters. In distinguishing *Storer*, the Court recognized the validity of a disaffiliation statute which still permits an independent-minded group or a minor party to gain access to the ballot with some candidate:

> Our focus on the associational rights of independent-minded voters distinguishes the

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[19] As noted by the Court, *id.* at 733, California also had other statutes specifically barring the sore loser scenario, Code, §§ 6402 and 6611, reprinted in Storer appendix, 415 U.S. at 748, 751.

> burden imposed by Ohio's early filing deadline from that created by the California disaffiliation provision upheld in *Storer v. Brown*,. . . . Although a disaffiliation provision may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements.

460 U.S. at 791 n.12 (citation omitted). In addition, the four Justices who dissented in *Anderson* relied extensively upon the holding in *Storer*. *Id.* at 812 (Rehnquist, J., dissenting).[20]

The far more restrictive statutes upheld by this Court in *Storer* and other ballot access cases confirm that the Minnesota ban on ballot fusion is not a significant intrusion on First Amendment rights. The Eighth Circuit was mistaken in ruling that the Minnesota ballot fusion ban severely impairs the New Party's associational rights.

III. THE IMPORTANT REGULATORY CONCERNS ADVANCED BY THE STATE'S BAN ON BALLOT FUSION OUTWEIGH THE MINIMAL IMPAIRMENT OF THE NEW PARTY'S ASSOCIATIONAL INTERESTS.

Properly analyzed, the ballot fusion ban does not burden the New Party's associational rights, and no

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[20] If the Court intended that *Storer* be read simply as permitting a state to disallow the sore loser scenario, *Anderson* would have been the time for the Court to so indicate. The dissenting Justices argued that *Storer* required upholding the Ohio law because John Anderson, like the plaintiffs in *Storer*, simply waited too late before deciding to pursue an independent candidacy. 460 U.S. at 812-17. The Court could have rejected the dissent's reliance upon *Storer* by noting that *Storer* dealt with the sore loser situation, which was not present in *Anderson*. *See id.* at 804 n.31. Instead, the Court distinguished *Storer* on other grounds. *See, e.g., id.* at 802-05.

further inquiry is necessary under the *Anderson v. Celebrezze*, 460 U.S. 780 (1983) balancing test. Nevertheless, if the Court were to conclude that there is some minimal impairment of rights, additional consideration is necessary. Where challenged state regulation of the electoral machinery does not severely burden associational rights protected by the First Amendment, the legislation is not subject to strict scrutiny and need not be narrowly tailored. *Burdick v. Takushi*, 504 U.S. 428, ___, 112 S. Ct. 2059, 2063 (1992). Rather, the Court recognizes that substantial regulation of elections is necessary as a practical matter, and that the State's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788 (footnote omitted).

Minnesota's ballot fusion ban even-handedly reduces voter confusion by simplifying the ballot, promotes candidate competition by reserving limited ballot space for opposing candidates and prevents electoral distortions by ballot manipulation. These important State interests, either each alone or in combination, outweigh the minuscule burden imposed on the New Party's associational interests.

A. A Ballot Fusion Ban Reduces Voter Confusion.

A fusion ban reduces voter confusion by keeping the ballot simple. The court of appeals erred in requiring the State to produce evidence in the record or from history showing that a fusion ban reduces voter confusion when casting a ballot. Pet. App. 9. Such evidence is not required when, as here, an asserted right "threatens to interfere with the act of voting itself. . . . " *Burson v. Freeman*, 504 U.S. 191, 209 n.11 (1992).

> To require States to prove actual voter confusion . . . as a predicate to the imposition of

> reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986).

Fusion invites the development of longer and more complex ballots. The reason is that fusion opens opportunities for candidates, parties and interest groups to use the ballot to seek advantages beyond the election of favored candidates, especially when getting on the ballot is as easy as Minnesota makes it. *See* Minn. Stat. § 204B.08, subd. 3 (1994) (nominating petition signature requirements for various offices, including 500 or less for legislative office).

For example, a candidate can use the fusion ballot to get his name listed as many times as possible on the ballot under multiple party names in the hopes of getting more voter attention. A candidate could use the opportunity for multiple party filing to associate his name with popular slogans on the ballot. A minor party can use the fusion ballot to associate with a popular major-party candidate in the hopes of gaining enough votes to win major-party status at the next election. Single-issue interest groups can use the fusion ballot to nominate major-party candidates in the hopes of convincing party leaders to retain, add or modify particular platform planks. These

opportunities presented by fusion tend to make the ballot longer and more complicated.

However, fusion may not benefit the voter at all. A fusion ballot, compared with a nonfusion ballot, either lists more parties next to a candidate's name or contains additional voting lines for each party nominating the same candidate. No exit poll of voters is needed to appreciate "[t]hat 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate. . . ." *Lubin v. Panish*, 415 U.S. 709, 715 (1974). More specifically, in *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), the court observed that "[w]ithout a ban on multiple party nominations, an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters." *Id.* at 386. *Cf. Packrall v. Quail*, 192 A.2d 704, 706 (Pa. 1963) (without state regulation, general election ballot may become "cluttered by candidates who are seeking to multiply the number of times their names appears on the ballot under various and inviting labels.").

Confusion by fusion is not merely judicial speculation. Others have noticed it. For example, a political scientist reported that fusion in New York "created the somewhat confusing picture of Mayor LaGuardia running under not less than nine different party labels in the course of his career. In the mayoralty campaign of 1941 alone his name appeared on four different tickets." G. Theodore Mitau, *Judicial Determination Of Political Party Organizational Autonomy: Some Recent Developments In The Law Of Parties (1936-1957)*, 42 Minn. L. Rev. 245, 256 (1957) (footnote omitted).

Minnesota has an important interest in avoiding voter confusion. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). It need not wait for real voters to be confused

before requiring a candidate to choose the single nominating party that best reflects his political beliefs and policies.

B. A Ballot Fusion Ban Promotes Candidate Competition By Reserving Limited Ballot Space For Opposing Candidates.

A ballot fusion ban promotes candidate competition by reserving limited space on the general election ballot for opposing candidates. Otherwise, minor-party candidates can coast along by nominating a major party candidate, thereby shortchanging voters of the diversity of candidates that better serves the core First Amendment values.

The Court's ballot access cases give high priority to presenting voters with candidates most likely to offer different ideas about what the government should do and how it should do it. Its "primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' " *Anderson*, 460 U.S. at 786 (citation omitted). In other words, ballot access restrictions should not, at least not without good reason, "reduce diversity and competition in the marketplace of ideas." *Id.* at 794.

A ballot fusion ban does not reduce the candidate choices available to voters or shrink the spectrum of ideas that opposing candidates are able to offer. On the contrary, it encourages minor parties to present candidates for election who may have been overlooked by the major parties. Such candidates may sometimes have useful ideas about government that were rejected or not considered by the major parties. *See, e.g., Sweezy v. State of New Hampshire*, 354 U.S. 234, 251 (1957) (Warren, C.J., plurality opinion) (absence of minority voices advocating ideas often ultimately accepted "would be a symptom of grave

illness in our society."). A ballot fusion ban promotes the diversity that the Court's ballot access cases seek to preserve by encouraging parties to chose their own candidates.

C. A Ballot Fusion Ban Prevents Electoral Distortions By Preventing Certain Ballot Manipulations.

A ballot fusion ban is also justified by the State's compelling interest in preserving the integrity of its election process. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). It prevents manipulation of the ballot by a) "raiding" of new major parties to gain short-term political advantage; and b) nomination of a popular major party candidate by a minor party simply to gain the status of a major party.

Cross-filing exposes a new but relatively weak major party to "raiding" by an established major party. Thus, for example, an established major party may decide that it would be to its advantage for its nominee to also appear on the ballot as the Reform Party nominee. If the Reform Party is relatively small, supporters of the established major party candidate could outvote supporters of the Reform Party's "real" candidate in the Reform Party primary. New York, the leading fusion state, is not immune from similar conduct. *See Zuckman v. Donahue*, 80 N.Y.S.2d 698, 700-01 (App. Div.) (upholding right of American Labor Party to cancel registration of former Democrats who, "prompted by ulterior motives," were "part of a prearranged plan to seize control."), *aff'd*, 81 N.E.2d 371 (N.Y. 1948).

In addition, a minor party may manipulate a fusion ballot solely to achieve status as a "major political party." A minor party permitted to nominate a popular major-party candidate is elevated under Minnesota law to

major-party status if five percent of the electorate votes for that candidate on the ballot line of the minor party and the party gets votes in each county. Minn. Stat. § 200.02, subd. 7(a) (1994). Thus, fusion allows the former minor party to get a preferred place on the general election ballot in the next election for all of its candidates without having to submit nominating petitions. Minn. Stat. § 204D.13 (1994).

However, achieving major-party status in this manner frustrates the State's effort to reserve the printed ballot for parties that secure a minimum level of voter support. A minor party that wins votes by nominating a major-party candidate is not clearly demonstrating a genuine level of voter support. Its separate vote tally may merely reflect the popularity of the major party's candidate and a degree of dissatisfaction with the major party rather than support for the minor party. The State should not be required to use its election machinery on behalf of a party whose credentials as a bona fide major party are so dubious.

The ballot manipulations described above are driven by insubstantial "short-range political goals," *Storer v. Brown*, 415 U.S. 724, 735 (1974), and conflict with the State's compelling interest in assuring fair and honest elections. A fusion ban reasonably prevents these manipulations.

D. A Ballot Fusion Ban Prevents Party Splintering.

A ballot fusion ban also serves the State's compelling interest in avoiding "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer*, 415 U.S. at 736. Major parties usually "have numerous members with a wide variety of interests, . . . features necessary for success in majoritarian elections. Consequently, the influence of any one

person or the importance of any single issue within a political party is significantly diffused." *Colorado Rep. Fed. Campaign Comm. v. F.E.C.*, ___ U.S. ___, 64 U.S.L.W. 4663, 4675, (U.S. June 26, 1996) (Thomas, J., concurring in the judgment and dissenting in part). Thus, "[b]road-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interest that combine to seek national goals." *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting).

Cross-filing invites major-party splintering and factionalism by making it possible for the various separate political interests that coalesce into a political party to make separate voter appeals at the ballot box. Thus, for example, the pro-life, lower tax and fair minimum wage factions of a major party may all separately nominate the same major party candidate under appealing ballot slogans when cross-filing is permitted. This turns the general election ballot into a forum for venting intraparty squabbles by creating competition among the various party interests. Such competition may properly be confined to the primary election. *See Storer*, 415 U.S. at 735 (recognizing legitimacy of state policy to avoid making general election ballot "a forum for continuing intraparty feuds.").

The court of appeals failed to appreciate these dangers, which are similar to those in California's abandoned cross-filing system. The California system allowed a candidate to be nominated more than once by allowing the candidate to enter (and win) more than one party primary. Bernard L. Hyink, et al., *Politics and Government in California* at 75 (12th ed. 1989). The California cross-filing law was repealed in 1959 after being widely criticized for "undermin[ing] party responsibility and cohesiveness." *Id.* at 76. *See also* William R. Kirschner, *Fusion And The*

Associational Rights Of Minor Political Parties, 95 Colum. L. Rev. 683, 719 n.254 (1995) (California cross-filing system reduced distinctions between parties and "electoral competition declined drastically."). The Constitution should not compel Minnesota to repeat California's mistake.

The court of appeals alluded to a situation ripe for splintering when noting that fusion would allow a single-issue minor party, such as the Right To Life Party, to nominate a major-party candidate. Pet. App. 9. The court saw this as a benefit because it gives voters more information about a candidate's views. *Id.* However, there is a countervailing harm associated with promotion of single-issue campaigns. Single-issue ballot campaigns sometimes do not lend themselves to the measured consideration compelled by the nature ot a broad party coalition. One commentator notes that:

> The traditional party roles of weighing competing interests, achieving compromise, and moderating demands in order to appeal to the maximum number of voters are not played in this process [of initiative] because they are not the participants. Single issue groups may include some of these concerns in their campaign strategy, but there is no institutional means to counter their issue perspective, and the propositions are thus typically more extreme than they would be if they were part of a party platform.

David Magleby, *Direct Legislation: Voting On Ballot Propositions In The United States* 189 (1984). *See also* Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. Pitt. L. Rev. 737, 741 (1981) ("Groups that achieve a tenuous coherence through advancing single, narrow ends are little inclined to re-examine the methods proposed. The morality of means does not flourish in an era of single-issue politics.").

In the absence of a fusion ban, opposing single-issue minor parties – like Right To Life and Pro-choice – can cross-nominate opposing major-party candidates. Because major-party candidates generally attract more attention than minor-party candidates, the election is more likely to become a thinly disguised ballot-issue campaign than it would if the two minor parties each nominated their own candidates. The Constitution should not be construed to require the State to foster the growth of single-issue parties, whose campaigns may have drawbacks similar to single-issue ballot elections.[21]

The court of appeals, citing *Norman v. Reed*, 502 U.S. 279 (1992), suggested that factionalism could be avoided merely by requiring consent of the major party and its nominee before a minor party can nominate the candidate of a major party. Pet. App. 7. However, the *Norman* analysis was applied in the context of a severe burden on the right of political association, which required that the challenged law be narrowly tailored to serve its purposes. As demonstrated above, the Minnesota ballot fusion ban has, at most, minimal effect on legitimate associational interests of the New Party, both as compared to the effect of the law challenged in *Norman*, in particular (pp. 29-31, *supra*), and as compared to other cases (pp. 36-40, *supra*)

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[21] Minnesota restricts ballot issue elections. Statewide ballot-issue elections in Minnesota are limited to state constitutional amendments proposed by the legislature. Minn. Stat. § 3.20 (1994). A proposed constitutional amendment authorizing statewide balloting on citizen-proposed issues failed in 1980. David B. Magleby, *"Let The Voters Decide? An Assessment Of The Initiative and Referendum Process,"* 66 U. Colo. L. Rev. 13, 32 (1995). City ballot elections initiated by voters are permitted only in the relatively few home-rule charter cities and then only if specifically authorized by city charter. Minn. Stat. § 410.20 (1994). Only 108 of Minnesota's 854 cities are home-rule cities. 28 Minn. Stat. Ann. at 1-20. (Supp. 1996).

and the core First Amendment values at issue (pp. 18-20, *supra*), in general. Thus, under the balancing test consistently applied by the Court, the State has more leeway than in *Norman* to fashion a reasonable regulation, even if somewhat broader than necessary to accomplish its asserted interests.

Because the effect of the ballot fusion ban on protected interests is minimal and the law serves important, recognized regulatory interests, the Eighth Circuit was wrong in declaring it unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be reversed.

Dated: July, 1996

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

PETER M. ACKERBERG
Assistant Attorney General

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Telephone: (612) 282-5712

Counsel for Petitioners

APPENDIX A

Statutory Compilation

Twelve states in addition to Minnesota directly prohibit fusion in at least some elections: Ga. Code Ann. § 21-2-137 (1993); Ill. Comp. Stat. Ch. 10, § 5/7-12(9) (1994); Ind. Code § 3-10-1-15 (1993); Kan. Stat. Ann. § 25-213 (1993); Ky. Rev. Stat. Ann. § 118.335; La. Rev. Stat. Ann. § 1280.25 (West Supp. 1996); Mo. Rev. Stat. § 115.351 (1994); Neb. Rev. Stat. § 32-612 (1995); Pa. Const. Stat. Ann. § 2870(f) (1994); Tenn. Code Ann. § 2-5-101(f)(1) (Supp. 1995); Tex. Elec. Code Ann. § 162.015 (West Supp. 1996); Wis. Stat. Ann. § 8.15(7) (West 1986 & Supp. 1995). Fusion is effectively prohibited in 20 states and the District of Columbia by a requirement that a candidate be registered in the party from which he or she seeks nomination: Ala. Code §§ 17-16-12, 17-16-14 (1995); Alaska Stat. § 15.25.030(14) (1995); Ariz. Rev. Stat. Ann. § 16-311(A) (1996); Cal. Elec. Code § 8022(a) (West 1989 & Supp. 1996); Colo. Rev. Stat. § 1-4-601 (1980); Fla. Stat. ch. 99.021(1)(b)(1995); Haw. Rev. Stat. § 12-3(a)(7)(1995); Me. Rev. Code Ann. tit. 21-A, § 334 (West 1993); Md. Ann. Code art. 33, § 4A-1(a)(1993); Mass. Gen. L. ch. 53, § 48 (1990); Nev. Rev. Stat. § 293.177 (1991); N.H. Rev. Stat. Ann. § 655:14 (1986 & Supp. 1995); N.J. Stat. Ann. § 19:23-5 (West 1989); N.M. Stat. Ann. §§ 1-8-2, 1-8-3, 1-8-18 (Michie 1995); N.C. Gen. Stat. § 163-106 (1995); Ohio Rev. Code Ann. § 3513.07 (Baldwin 1994); Okla. Stat. tit. 26, § 5-105 (1991); R.I. Gen. Laws § 17-14-1 (1956 & Supp. 1995); W. Va. Code § 3-5-7 (1994); Wyo. Stat. § 22-5-204 (1992); and D.C. Code Ann. § 1-1312(j)(2) (1981 & Supp. 1995).

Four states forbid fusion by permitting a candidate to accept only one nomination: Iowa Code § 49.39 (1995); Mich. Comp. Laws § 168.692 (1989); Mont. Code Ann. § 13-10-303 (1995); and N.D. Cent. Code § 16.1-12-06 (1991). Six states have election laws that could reasonably be construed as a fusion ban: Del. Code Ann. tit. 15, § 3107 (1993); Miss. Code Ann. § 23-15-305 (1990); S.C. Code Ann. 7-11-210 (Law Co-op 1976 & Supp. 1995); Va. Code Ann. § 24.2-525 (Michie 1993); Wash. Rev. Code Ann. § 29.30.095 (West 1995); *Smith v. Ward*, 197 N.W. 684, 684 (S.D. 1924) (construing predecessor statute to S.D. Codified Laws Ann. § 12-6-8 (1995).

Four states permit fusion: N.Y. Elec. Law § 6-120 (McKinney 1978 & Supp. 1996); Or. Rev. Stat. § 248.008(8) (1995); and Vt. Stat. Ann. tit. 17, § 2474 (1982 & Supp. 1994) and Utah Code Ann. § 20A-9-201 (1995).

Election statutes in three states do not prohibit fusion: Ark. Code Ann. § 7-3-107 (Michie 1993) and Conn. Gen. Stat. § 9-451 (1989); *see also Sufphen v. Enking*, 230 P. 38, 39 (Idaho 1924) (nomination of non-party member not prohibited).

APPENDIX B

Act of April 2, 1996, ch. 419, 1996 Minn. Laws 979

Section 1. **PURPOSE**

The purpose of this act is to permit a candidate to appear on the general election ballot as the nominee of more than one political party. This act does not permit the candidate's name to appear on the ballot more than once, because to do so might give the candidate an unfair advantage and might cause some voters to become confused about how to cast their votes, to vote improperly, and to have their votes not counted. This act does not permit the voter to cast a vote for the candidate's party, because the function of an election in the United States is to choose an individual to hold public office, not to choose a political party to control the office and because to do so might likewise cause some voters to become confused.

Sec. 2. Minnesota Statutes 1994, section 200.02, subdivision 7 is amended to read:

Subd. 7: MAJOR POLITICAL PARTY. "Major political party" means a political party that maintains a party organization in the state, political division or precinct in question and:

~~(a) Which~~(1) that has presented at least one candidate for election to a partisan office at the last preceding state general election, ~~which candidate~~ who received votes in each county in that election and received votes from not

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Additions are indicated by underline; deletions by strikeout

less than five percent of the total number of individuals who voted in that election; or

~~(b)~~(2) whose members present to the secretary of state ~~a petititon~~ for a place on the state partisan primary ballot, ~~which~~a petition that contains signatures of a number of the party members equal to at least five percent of the total number of individuals who voted in the preceding state general election.

Votes cast for a candidate who was the nominee of more than one political party in a state general election are not counted in determining whether a minor political party should become a major political party under clause (1).

Sec. 3. Minnesota Statutes 1994, section 200.02, is amended by adding a subdivision to read:

Subd. 22. **MINOR POLITICAL PARTY.** (a) "Minor political party" means a political party that is not a major political party as defined by subdivision 7 and that has adopted a state constitution, designated a state party chair, and met the requirements of paragraph (b) or (c), as applicable.

(b) To be considered a minor party in all elections statewide, the political party must have presented at least one candidate for a partisan office voted on statewide at the preceding state general election who received votes in each county that in the aggregate equal at least one percent of the total number of individuals who voted in the election, or its members must have presented to the

secretary of state a nominating petition in a form prescribed by the secretary of state containing the signatures of party members in a number equal to at least one percent of the total number of individuals who voted in the preceding state general election.

(c) To be considered a minor party in an election in a legislative district, the political party must have presented at least one candidate for a legislative office in that district who received votes from at least ten percent of the total number of individuals who voted for that office, or its members must have presented to the secretary of state a nominating petition in a form prescribed by the secretary of state containing the signatures of party members in a number equal to at least ten percent of the total number of individuals who voted in the preceding state general election for that legislative office.

(d) Votes cast for a candidate who was the nominee of more than one political party in a state general election are not counted in determining whether a minor political party should remain a minor political party under this subdivision.

Sec. 4. Minnesota Statutes 1994, section 204B, subdivision 2, is amended to read:

Subd. 2. CANDIDATES SEEKING NOMINATION BY PRIMARY. No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition,

except as otherwise provided for ~~partisan offices in section 204D.10, subdivision 2~~simultaneous nominations in section 5, and for nonpartisan offices in section 204B.13, subdivision 4. A major party candidate who fails to be nominated at the state primary may not be listed on any ballot at the subsequent state general election, except to fill a vacancy as provided in section 204B.13.

Sec. 5. Minnesota Statutes 1994, section 204B.04, is amended by adding a subdivision to read:

Subd. 2a. SIMULTANEOUS NOMINATION. A candidate may seek the nomination of a major political party and one or more minor political parties for the same partisan office simultaneously if the state chair of the parties whose nomination is sought consents in writing to the simultaneous nomination. The forms for written consent of the party chair must be prepared in the manner provided by the secretary of state. A candidate may not be nominated by petition for a partisan office without the written consent of the candidate.

A candidate who seeks the simultaneous nomination of a major political party and one or more minor political parties and fails to be nominated at the state primary for the major political party forfeits the nominations of the minor political parties.

A candidate may not seek the nomination of either a major or minor political party, or both, and file a nominating petition as an independent candidate for the same election.

Sec. 6. Minnesota Statutes 1995 Supplement, section 204B.06, subdivision 1, is amended to read:

Subdivision 1. FORM OF AFFIDAVIT. An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

(a) is an eligible voter;

(b) has no other affidavit on file as a candidate for any other office at the same primary or next ensuing general election, except that a candidate for soil and water conservation district supervisor in a district not located in whole or in part in Anoka, Hennepin, Ramsey, or Washington county, may also have on file an affidavit of candidacy for mayor or council member of a statutory or home rule charter city of not more than 2,500 population contained in whole or in part in the soil and water conservation district or for town supervisor in a town of not more than 2,500 population contained in whole or in part in the soil and water conservation district; ~~and~~

(c) is, or will be on assuming the office, 21 years of age or more, and will have maintained residence in the district from which the candidate seeks election for 30 days before the general election; and

(d) accepts the nomination, if nominated by petition.

An affidavit of candidacy must include a statement that the candidate's name as written on the affidavit for ballot designation is the candidate's true name or the name by which the candidate is commonly and generally known in the community.

An affidavit of candidacy must include a statement that the candidate's name as written on the affidavit for ballot designation is the candidate's true name or the name by which the candidate is commonly and generally known in the community.

An affidavit of candidacy for partisan office shall also state the name of the candidate's political party or political principle, stated in three words or less.

A candidate seeking the simultaneous nomination of a major political party and one or more minor political parties shall include the consent forms from the party chairs required by section 204B.04, subdivision 2a, with the affidavit of candidacy.

Sec. 7. Minnesota Statutes 1994, section 204D.12, is amended to read:

204D.12 NAMES PLACED ON GENERAL ELECTION BALLOTS

Without payment of an additional fee, the county auditor shall place on the appropriate state general election ballot the name of every candidate:

(a) Whose nomination at the state primary has been certified by the appropriate canvassing board;

(b) Who has been nominated by petition, including candidates certified by the secretary of state; and

(c) Who was nominated and whose name was omitted from the state nonpartisan primary ballot pursuant to

section 204D.07, subdivision 3. Only the names of duly nominated candidates may be placed on a ballot.

A candidate who is nominated for an office by more than one political party may be listed on the ballot only once.

Sec. 8. Minnesota Statutes 1994, section 204D.13 is amended by adding a subdivision to read:

Subd. 4. SIMULTANEOUS NOMINATION. A candidate who is nominated by a major political party and one or more minor political parties shall appear on the ballot in the space designated for the major political party candidate for the office sought. A candidate who is nominated by more than one minor political party but is not the nominee of a major political party shall appear on the ballot in the position designated for the first party filing a nominating petition with the filing officer. The name of each political party nominating the candidate shall appear on the ballot with the candidate's name.

Sec. 9. **REPEALER.**

Minnesota Statutes 1994, section 204D.10, subdivision 2, is repealed.

Sec. 10. **EFFECTIVE DATE.**

This act is effective for the state primary election in 1996 and thereafter.

The amendments made by this act are suspended during any time that the decision of the eighth circuit court of appeals in Twin Cities Area New Party v.

McKenna, No. 94-3417MN, is stayed or the mandate of the court is recalled. If the McKenna decision is reversed, the amendments made by this act expire and the prior law is revived. The purpose of this paragraph is to provide an orderly procedure for complying with the McKenna decision while retaining the prior law prohibiting simultaneous nominations to the extent permitted by the United States Constitution.

Presented to the governor March 30, 1996.

Approved April 2, 1996.

Additions are indicated by underline; deletions by strikeout

No. 95-1608

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and Joan Anderson Growe, Secretary of the State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE RESPONDENT

Sarah E. Sheeno
Boardman, Suhr, Bardwell & Galland
44 East Mifflin Street
Suite 600
Madison, WI 53703
(608) 255-3988

Clement J. Hirschboeck
Daniel C. Vliet
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Laurence H. Tribe
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Jon. Roosa
University of Wisconsin Law School
Madison, WI 53706
(608) 262-4266

Counsel for Respondent

QUESTION PRESENTED

May a state bar a minor political party from nominating its chosen candidate merely because the candidate is also another party's nominee — even when the candidate consents to the minor party's nomination, and the other party does not object?

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1. Introduction

This case concerns the right of a minor party to engage in ballot "fusion" — to nominate, in a manner noted on the election ballot, a consenting candidate also nominated by another non-objecting party. This practice, once widespread in the United States and plainly essential to the development of minor parties within our "winner take all" election system, is absolutely banned by the State of Minnesota. The Minnesota fusion ban, the statute challenged here, violates the First and Fourteenth Amendments. It clearly and severely abridges core rights of minor parties and their members — most basically, the right of parties to choose their standard bearers, and the right of minor parties to operate free of electoral restrictions falling disproportionately on them. These rights have long been recognized as fundamental by this Court. *Norman v. Reed*, 502 U.S. 279 (1992); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The interests the State offers in defense of abridging these rights are either not legitimate, or not sufficiently weighty or narrowly advanced by the ban, to justify that infringement.

2. Facts of This Case

Respondent Twin Cities Area New Party ("the New Party") was chartered as a chapter of the national New Party in the spring of 1993. J.A. 2.[1] The New Party's broad aims are identical to those of more established parties: to promote

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[1] The Joint Appendix is cited as "J.A."; the Appendix to the Petition for a Writ of Certiorari as "Pet. App."; the Brief for Petitioners as "State Br."; and the Appendix to that brief as "State Br. App."

candidates its members judge best represent their views, to use the electoral process to advance its program, and to widen its base of support in the general electorate. J.A. 6. To advance these aims, the New Party resolved on a mixed electoral strategy combining the nomination of candidates running exclusively as New Party candidates and, where appropriate, nomination of willing candidates of other non-objecting parties. J.A. 5.

In April 1994, New Party members voted to nominate Andy Dawkins, the then incumbent Democratic Farm-Labor ("DFL") state representative from Minnesota House District 65A who was seeking DFL's nomination for reelection, as a fusion candidate. J.A. 3. Although the Party met all substantive ballot access requirements (J.A. 5-6), although Dawkins consented to New Party's nomination (J.A. 5, 10), and although the DFL voiced no objection,[2] the State refused to list Dawkins on the ballot as a New Party candidate on the ground that Dawkins was also a candidate for nomination by the DFL.[3] J.A. 4-5. The New Party sued.

3. Decision Of The Court Below

The district court dismissed the New Party's claim, but

[2] The DFL neither objected to the nomination before the lawsuit, nor asserted any objection to it in the lawsuit. Pet. App. 2, 5.

[3] Minnesota bars fusion both by "'major' parties" — defined in Minnesota as parties that have won 5 percent of a statewide vote and therefore participate in the state primaries (Minn. Stat. § 200.02 subd. 7) — and "minor" parties like the New Party, which have not yet qualified as "major." But it does so through different election code provisions. The major party fusion ban appears in Minn. Stat. § 204B.04 subd. 1, and was not at issue in this challenge. Pet. App. 10. The ban on fusion by "non-major" parties like the New Party is effected by Minn. Stat. §§ 204B.06 subd. 1(b) & 204B.04 subd. 2. These are the statutes that were challenged in this case, and held unconstitutional by the court below. Pet. App. 10.

the court of appeals reversed. Finding that fusion was banned in Minnesota and other states at the turn of the century to "squelch the threat by the opposition's combined voting force" (Pet. App. 4), the court concluded that the ban imposed a severe burden on the New Party's associational rights by forbidding the Party to nominate its chosen candidate, despite having the candidate's and the other party's "blessing." *Id.* at 5. The court rejected the claim that the burden was insignificant because the New Party could just "pick someone else" as its nominee (*id.* at 6), and noted that the ban prevented the New Party "from developing [the] consensual political alliances" upon which it depended, as a minor party, in order to "broaden the base of public participation in and support for its activities." *Id.*

> By foreclosing a consensual multiple party nomination, Minnesota's statutes force the New Party to make a no-win choice. New Party members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all.

Id.

The court of appeals concluded, moreover, that the fusion ban was broader than necessary to serve the State's asserted interests. *Id.* The State's concerns about splintering, for example, could be served by laws requiring the consent of the candidate and the candidate's party.[4] Where consent is present, the court below explained, the State "has no authority to protect a major party from internal discord and splintering resulting from its own decision to allow a minor party to nominate the major party's candidate" (Pet. App. 7), and it

[4] The court held that consent was present in the DFL's failure to raise any objection. *Id.* at 2. Where a major party has an opportunity to object, concerns over involuntary fusion are avoided.

may not "constitutionally substitute its own judgment for that of the [major] [p]arty." *Id.* Even if states had such extraordinary power, however, the court found that the State's concern was not a real one, in that — by fostering more competition, participation, and representation — consensual fusion would likely *invigorate* the electoral system rather than threaten its integrity. *Id.*

Similarly, the court concluded that the State's concerns about voter confusion could be dealt with in less restrictive ways — by simple explanations on the ballot — and that, in any event, the concerns themselves were unfounded. As the court observed, consensual fusion "informs voters rather than misleads them" and, by bringing the two parties' political alliance into the open, "helps the voters understand what the candidate stands for." Pet. App. 8. Taking note of this Court's teaching "that courts must skeptically view a state's claim that it is enhancing voters' ability to make wise decisions by restricting the flow of information to them," *Tashjian*, 479 U.S. at 221, the court of appeals observed that "neither the record nor history reveal any evidence that [fusion] nominations have ever caused any type of confusion among voters, in Minnesota or anywhere else." Pet. App. 9.

The court of appeals concluded that the State's remaining concerns were clearly unjustified, either because they were easily avoided by other means or because they were not furthered by the ban. It also noted that the court in *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), in upholding Wisconsin's fusion ban, had failed to consider whether that ban could have been more narrowly tailored. For all these reasons, the court concluded that Minnesota's fusion ban was unconstitutional. Pet. App. 10.

4. Historical Facts About Fusion

While the nomination of the same candidate by two parties may appear novel today, it was familiar to our forebears. Until the end of the 19th century, fusion was legal throughout the United States. Summarizing the 19th century experience, America's leading electoral historian, Peter Argersinger, notes that fusion was utilized particularly heavily by minor parties in the Midwest and West in the latter 19th century, figuring in virtually every significant election in that period, Argersinger, "'A Place on the Ballot': Fusion Politics and Antifusion Laws," 85 *American Historical Review* 287, 288 (1980), and that:

> [Fusion] helped maintain a significant third party tradition by guaranteeing that dissenters' votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard. Most of the election victories normally attributed to the Grangers, Independents, or Greenbackers in the 1870s and 1880s were a result of fusion between those third party groups and Democrats.

Id. at 288-89.

Banned in Minnesota since 1901, and widely banned in other states around the same time, fusion is today permitted only in New York, Connecticut, and a few other states, and widely practiced only in New York. There, however, contemporary observers underscore its importance to supporting a lively minor party tradition since its relegalization in the 1930s. J.A. 15.[5] As in the 19th century, fusion has

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[5] D. Mazmanian, THIRD PARTIES IN PRESIDENTIAL ELECTIONS (1974), notes at 134-35:

> The essential attribute of New York's modified two-party (fusion)

helped minor parties by permitting them to show their real strength at the polls. And they have often done so dramatically, by providing the margin of victory for prominent candidates. The New York Presidential victories of Franklin Roosevelt in 1940 and 1944, John Kennedy in 1960, and Ronald Reagan in 1980, for example, all required combining major and minor party votes; none of these candidates secured enough votes for victory on the line of his "major" party alone. (J.A. 15-16) Similarly today, Alfonse D'Amato would not be a U.S. Senator from New York, George Pataki would not be Governor of New York, and Rudolph Giuliani would not be Mayor of New York City, but for their fusion support from parties other than the Republican Party. *Id.*; NEW YORK RED BOOK 1995-1996 868 (G.A. Mitchell ed. 1996); THE GREEN BOOK 1994-1995, OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 4 (1995). Even the State does not dispute that "the practice 'has permitted electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in the selection of mainstream candidates.'" State Br. 5, quoting Burnham Decl., J.A. 15.

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system is the options it provides to both individual voters and political parties. For the same issue-oriented voters the presence of fairly durable third parties affords a greater variety of choices among party platforms and candidates than does a two-party contest. Alternative arenas are available for potential activists who find the major-party organization either preoccupied with winning office or dominated by an older generation of politicians. Furthermore, the system does not force voters to choose between "throwing away their vote" or voting for one of the two major parties. The modified system allows third parties to retain their specialized constituencies while contributing to election outcomes through coalitions with the major parties. Finally, the ability of third parties to survive over time makes them vehicles for new issues and new programs that otherwise would have to await acceptance by a much broader audience before the major parties would address them.

Correlatively, all historical and political science scholarship on the subject confirms that *removing* the right to fusion disproportionately *burdens* minor parties.[6] And all historical evidence suggests that doing just that was the unmistakable aim of the major party legislators sponsoring such efforts at the turn of the century.[7] Characteristic is the declaration of a Republican state legislator from Michigan, offered at the time of his party's sponsorship of that State's anti-fusion ban:

> We don't propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation.

Argersinger, *supra*, at 296. And in Minnesota, despite the absence of *direct* evidence of the legislative intent behind its 1901 ban, the circumstantial evidence could hardly be stronger that the ban was prompted by and directed against third party successes of the period[8] — a point the State also does not

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[6] For historical studies of the effects of fusion bans, *see* Burnham Decl., J.A. 11-18; Argersinger, *supra*; G.O. Clanton, KANSAS POPULISM: IDEAS AND MEN 220-30 (1969); S. Rosenstone, R.L. Behr, and E.H. Lazarus, THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE (1984); and Brief Amici Curiae Of Twelve University Professors And Center For A New Democracy In Support Of Respondent Twin Cities Area New Party ("Amicus Brief of Twelve Professors").

[7] *See generally*, Burnham Decl., J.A. 13-15; Argersinger, at 295-98; Clanton, *supra*.

[8] During the years before enactment of the ban, fusion was deployed heavily in Minnesota politics by Democrats and Populists, and with considerable effect. As a Democrat/People's Party fusion candidate, John Lind gained 48 percent of the gubernatorial vote in 1896 and then won the governorship with 52 percent of the vote as a fusion candidate in

dispute. State Br. 5.

This aim of suppressing threats from minor parties was substantially accomplished with the proliferation of state bans on the practice. Operating in an environment generally devoid of the fusion option, 20th century minor parties became much more candidate-centered, less frequent, and less enduring than their 19th century counterparts.[9]

Nor is there controversy about just *why* fusion is so important to minor parties. American elections are generally run on "first past the post, winner takes all" rules. Burnham Decl., J.A. 12-13. In such a system, political influence depends on the ability to win a majority or plurality of votes. Being *minor*, minor parties operating in this system typically lack the capacity to command the majority or plurality of votes needed to win electoral office on their own. In the absence of a fusion

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1898, becoming the first non-Republican Minnesota governor in 30 years. He ran again as a fusion candidate in 1900, and lost only narrowly, winning 48 percent of the vote to Van Sant's 49 percent. MINNESOTA LEGISLATIVE MANUAL 165-66 (1993-94). The ban was enacted the following year by a Republican-dominated legislature, and Republican dominance was reestablished immediately, with Republicans easily winning each of the next 15 gubernatorial elections. *Id.* at 166.

Fusion also was a significant factor at the Presidential level during the years immediately preceding enactment of the 1901 ban. In 1892, James B. Weaver ran on both the "Fusion Electors" and Peoples Party tickets, and won a (36 percent) plurality of the votes cast. In 1896 and 1900, William Jennings Bryan ran on the Democratic and Peoples Party tickets, and won 39 and then 36 percent of the vote. In the five previous three-way races from 1860 to 1888 in which the third party candidates did not fuse, no third party candidate received even 5 percent of the vote. *Id.* at 318-319.

[9] *See* Penniman, "Presidential Third Parties and the Modern American Two-Party System," in W. Crotty (ed.), THE PARTY SYMBOL 101-117 (1980); S. Rosenstone, THIRD PARTIES IN AMERICAN HISTORY; Mazmanian, THIRD PARTIES IN PRESIDENTIAL ELECTIONS (1974).

option, they suffer in consequence from a "wasted vote syndrome." Reluctant to "waste" votes on candidates they perceive as having no serious chance of winning, even voters who support the party's ideology and program will often decline to show that support at the polls. *Id.*, J.A. 13.[10] This syndrome, in turn, reconfirms the diminutive stature of minor parties by putting them in a growth trap. Not yet strong enough to win on their own, they have trouble mobilizing the support needed to build their strength.

When available, historically and today, fusion is used by minor parties to escape this trap. Fusion allows minor parties to enter into alliances with major parties around selected candidates, and to participate in potentially winning electoral coalitions. This enables them to escape the wasted vote syndrome. By following their party's label into that coalition, minor party *supporters* are able to express their support for their party, but not at the expense of wasting their votes on non-viable candidates. They can vote their principles without sacrificing their prudence, and in the process "send a message" to the fusion candidate and others about the party basis of their support. By increasing overall support for the candidate, moreover, the minor party *itself* is able to show the candidate and its major party coalition partner the worth of its support[11] — and thus to gain influence and power.[12]

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[10] Such considerations are paramount to the New Party in this case. *See* Maynes Aff., J.A. 6-7.

[11] This demonstration is most evident when fusion votes are cast on a "disaggregated" ballot — with separate lines for the different parties nominating the fusion candidate — especially when that candidate's overall margin of victory is less than the votes received on the minor party's line. Even where the margin is greater, however, or where separate ballot lines are not provided, fusion has a similar effect. It permits the minor party to make a contribution, and to be seen as making that contribution; and it permits party supporters to express that support without cost to the efficacy of their vote. *See Swamp*, 950 F.2d at 388-89 (Ripple, J., joined by Posner

Because the "wasted vote syndrome" drives an artificial wedge between latent and expressed support for minor parties, fusion — by removing that wedge — permits a minor party's real level of support in the electorate to be expressed.

In sum, fusion is not an obscure bit of electoral exotica, but a central balancing mechanism of our winner-takes-all electoral system. Historically and today, it has been perhaps *the* central and distinctively American answer to the question of how, within such a system, to assure electoral minorities a fair "availability of political opportunity." *Lubin v. Panish*, 415 U.S. 709, 716 (1974); Burnham Decl., J.A. 17; Argersinger, *supra,* at 288-89. And as 20th century experience shows, widespread denial of this right has had the effect, *intended* by those who enacted the bans (*see* pp. 7-8, nn. 7&8, *supra*), of denying such minorities effective political expression. For such minorities, the denial imposes a Hobson's choice between political efficacy and conviction — prudence and principle — and in all but the most extraordinary times condemns them to political marginality.[13]

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and Easterbrook, JJ., dissenting from denial of rehearing *en banc*).

[12] *See* L. Sandy Maisel and C. Bassett (eds.) "Cross-Endorsement Rule," 1 POLITICAL PARTIES AND ELECTIONS IN THE UNITED STATES: AN ENCYCLOPEDIA 218 (1991):

> [Fusion] allows state minor parties to sustain themselves without actually winning elections on their own, as voters can demonstrate support for minor parties and not "waste" their votes on minor party candidates....[Fusion] gives minor parties some bargaining ability, as they can exchange their endorsement for ideological or material concessions.

[13] Such "extraordinary times" prominently include world war and massive depression, as Minnesota's own experience with the Farmer-Labor Party ("FLP") makes clear. Out of a loose independent political federation formed during the domestic turmoil associated with World War I, the FLP was consolidated in 1923-24 in expectation of state gubernatorial success

SUMMARY OF ARGUMENT

While political parties are not mentioned in the Constitution, they have always been understood to perform key functions in the working of representative democracy and to be essential vehicles of constitutionally protected speech and association. In the operation of our republican form of government, parties are fundamental. They are *the* principal means by which individuals associate in the advancement of common political aims, and by which political competition and governance itself are *organized* — from the articulation of programs of public action, to the identification of candidates to carry those programs into effect, to the contest among those candidates in regular elections, to the coordination and discipline of elected officeholders. And as organizations indispensable to the effective exercise of political liberty, parties inherit the protections of that liberty found in the Constitution.

At least in recent decades, this Court has found that inheritance to include the right of parties themselves, as collective associations of members and supporters, to direct protection under the First and Fourteenth Amendments. And in our "scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), the Court has explicitly recognized the need to protect new and minor parties from regulation, *de facto* authored by their major party competitors, imposing distinctive burdens on their ability to survive and grow. More particularly,

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for itself and presidential success for Robert M. LaFollette in the elections of 1924. Disappointment in both expectations quickly led to disarray. The Great Depression intervened to revive the party's fortunes, and it enjoyed a string of successes over the short period of 1930-36. But by 1938 it had effectively collapsed. *See* M. Gleske, MINNESOTA FARMER-LABORISM: THE THIRD PARTY ALTERNATIVE (1979); R. Valelly, RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY (1989). *See also* Amicus Brief of Twelve Professors.

this Court, while respectful of the needs of states to regulate the election process, has declared the substantial *autonomy* of parties and their members to govern their own affairs and choose their electoral strategies, and the right of minor parties to regulatory *neutrality* — understood as freedom from overt discrimination and from regulatory burdens falling disproportionately on them — as bedrock constitutional rights under the First and Fourteenth Amendments.

Constitutive of these rights are the more specific rights of minor parties and their members (1) to choose their nominees, (2) to communicate that choice to supporters on terms equal to those offered other parties, and (3) to do so on their own ballot line. A finding of the first two rights is necessary and sufficient to uphold the decision of the court below; a finding of the third would be sufficient, but is not necessary.

The first two rights are severely infringed by Minnesota's absolute ban on fusion, which may be thought either to extinguish them directly or unconstitutionally to condition the exercise of one on the surrender of the other. Where the minor party chooses as its standard bearer the nominee of another party, the ban prohibits that choice from being communicated by the party on terms equal to those offered other parties — with a "label" on the ballot indicating that the minor party has in fact nominated that candidate. Or the minor party is "permitted" a label, but only for a nominee that is not in fact its first choice. It would be difficult to imagine a more oppressive intrusion on party functioning, or a more invidious discrimination against an electoral tactic of uncontested importance to minor parties. Nothing is more fundamental to a party than the choice of candidates to represent it in electoral competition. Nothing is more important to a party's ability to mobilize its supporters around candidates than its ability to identify those candidates, on the ballot, as its own. Nothing is more important to voters wishing to support

the party than the ability to receive that information.

In denying the minor party a right to communicate its choice of candidate, Minnesota's fusion ban *a fortiori* suppresses the party's right to do so on its own ballot line. But the distinctness of that line, and the consequent ability to show the real dimensions of its support among voters, is literally constitutive of the strength of the party and its supporters in the electoral marketplace. Nothing more successfully defeats the workings of a partisan election system than a ban on recording and distinguishing the strength of partisans. Nothing could be more deeply violative of the fundamental rights of parties and their supporters freely to associate for the advancement of their common political aims and to petition for that purpose.

In any challenge to a state election law, a court must weigh the burden on the constitutional rights imposed by the challenged law against the state interests the law purportedly serves. As announced in *Anderson*, and subsequently reaffirmed in *Burdick v. Takushi*, 504 U.S. 428 (1992), the reviewing court must first identify "the character and magnitude of the asserted injury" to the challenger's protected rights; then identify the "precise interests put forward by the state as justifications" for that injury, in every case taking into account "the extent to which those interests make it necessary to burden the plaintiff's rights" — an inquiry that demands at least a close "fit" between the challenged law and the State's interests. *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. Indeed, in cases such as this, where the abridgement is direct and severe, there must be proof that the State has "chosen the most narrowly tailored means," *Norman*, 502 U.S. at 294, "to advance a state interest of compelling importance." *Id.* at 289.

In this case, either standard leads ineluctably to invalidation of Minnesota's absolute ban on fusion.

Given the heavy burdens Minnesota's fusion ban imposes on core first amendment freedoms, it is incumbent on the State to show equally fundamental state interests to be narrowly advanced by the ban. But the State does not come even close to making this showing, for the basic reason that the interests it asserts in defense of the ban — interests in avoiding voter confusion, protecting political diversity, avoiding electoral "distortions," and avoiding faction — are not even *rationally related* to it and, in some instances, are flatly inconsistent with the First Amendment itself.

The ban does not reduce voter confusion; it promotes it — by misleading voters about the real sources of candidate support and the real distribution of partisan support in the electorate. The ban does not protect political diversity; it suppresses it — by making it far more difficult for minor parties to survive and grow. And the ban does not diminish the only even arguable "distortion" identified by the State — the "raiding" of one major party's primary by supporters of another — for the simple reason that it is challenged only in its application to *minor* parties, who hold no primary elections in Minnesota. Finally, and on its face, the ban does not prevent faction — but alliance.

Worse still, the State's defense of its fusion ban rests impermissibly on the supposed virtues of withholding indisputably truthful information from voters and wrongly confuses the entirely correct proposition that the First Amendment advances the *ends* of ideological and political diversity with the quite different, and constitutionally false, proposition that the First Amendment permits the State to employ, as a *means* to that end, the power simply to mandate its vision of diversity by editing or manipulating the political choices made by the people themselves through the parties with which they choose to associate.

With the burden on the constitutional rights of the New Party and its supporters this heavy, and not even the beginnings of justification offered by the State, the judgment of the court below should be affirmed.

ARGUMENT

I. POLITICAL PARTIES HAVE RIGHTS TO AUTONOMY AND NEUTRAL TREATMENT.

Political parties have rights of association protected by the First and Fourteenth Amendments:

> [I]t is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.

Eu, 489 U.S. at 224, quoting *Tashjian*, 479 U.S. at 214.

This Court's decisions declare two broad areas of judicial solicitude for party rights: where regulations burden party *autonomy* in the performance of key organizational functions (*e.g.*, internal governance, candidate selection, general electoral strategy); and where regulations violate basic notions of *neutrality* by disproportionately burdening minor parties. These rights are enjoyed by parties directly, as organizations of like-minded individuals who have chosen to associate in the advancement of political aims, and they limit the intrusion of state power into party operations. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), the Court held that state law could not override rules of the national Democratic Party for selecting that party's delegates to a Presidential convention. In *Tashjian*, it held that a state Republican Party had a first amendment right to invite non-members to vote in its primary and struck down a closed primary law interfering with that right. In *Anderson*, it struck

down early filing requirements as disproportionately burdensome to independent candidates and minor parties. In *Eu*, it invalidated a state law prohibiting political parties from endorsing candidates before a primary. And in *Norman*, it enjoined Illinois from enforcing a law that prohibited a minor party from using the name of another, consenting party.

With respect to *autonomy*, the cases have repeatedly underscored the importance of respecting a party's own choices about organizational governance and strategy, including electoral strategy. As the Court observed of the Republican Party's unusual strategic choice in *Tashjian* — to open its primary to non-Republican voters — "[t]he Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." 479 U.S. at 214. Such choices are for the party and its supporters, not states, to make.

With respect to *neutrality*, the cases make clear that the First Amendment protects the right of minor parties to operate in an electoral system not structured so as to be disproportionately burdensome to them. This Court has been properly suspicious of the potential abuse, by major parties, of their *de facto* monopoly on state legislative power to erect artificial barriers to competition from minor parties.

The right to neutrality certainly includes protection from open and obvious discrimination against minor parties. Thus in *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio ballot access law that discriminated against minor parties on its face. Ohio defended its law as promoting the two-party system "in order to encourage compromise and stability." This Court found this unacceptable, responding that "[t]he Ohio system does not merely favor a 'two-party system'; it favors Republicans and Democrats — and in effect tends to give them a complete monopoly." *Id.* at 31-32. On its face, the Ohio statute violated the essential

neutrality required of state action with regard to the participants in electoral competition.

But more than a formal appearance of neutrality is required. The first amendment right of minor parties to political liberty and equal opportunity includes the right to be free from facially neutral regulation that, given the place of minor parties in our electoral system, predictably and inherently saddles them with a disproportionate burden. Thus in *Anderson*, this Court struck down a filing deadline affecting both partisan and independent candidates. It did so after considering the special impact of such a deadline on independent candidates (who typically do not decide to make an independent bid for office until much closer to the election), and after concluding that the deadline was predictably disproportionate in its burden on such candidates and on minor parties. 460 U.S. at 790-93. The Court held that a "burden that falls unequally on new or small political parties or on independent candidates impinges, *by its very nature*, on associational choices protected by the First Amendment." *Id.* at 793-94 (emphasis added). Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), and *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-98 (1982), the Court mandated the exemption of minor parties from disclosure requirements on campaign finance that it had upheld as applied to major parties — on the ground that such disclosure as applied to parties outside the mainstream was unduly burdensome, unnecessary given their well-publicized viewpoints, and potentially threatening to their members.

These decisions do not mandate "affirmative action" for minor parties — in the sense of preferential treatment directed to improving their resources or standing.[14] Nor do they raise

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[14] Nor does the New Party assert any such mandate here, despite the State's fanciful assertions that the Party seeks affirmative state action

any fundamental challenge to the defining political rules by which electoral outcomes are generally decided — as "winner take all" contests within single-member districts. But where a regulation is dispensable in the maintenance of such rules, where it serves no other important state interest, where it inherently has a disproportionately adverse impact on the ability of minor parties to achieve political efficacy, and where it thereby undermines the core value of fair equality of political opportunity, it cannot stand. *See Anderson*, 460 U.S. at 793 n.15.[15]

This case involves burdens on both the autonomy and neutrality rights of political parties and their members. On its *face*, the Minnesota law limits every political party's autonomy in choosing candidates. In its *consequences*, it restricts the availability of political opportunity in ways disproportionately burdensome to minor parties — by denying them the ability to enter those electoral coalitions that they, as minor parties, disproportionately need if they are to be viable in our "winner take all" election system.

Within this broad frame of reference, one can identify three quite specific and concrete first amendment rights of minor parties that the Minnesota ban on fusion essentially obliterates: (1) the right to nominate the candidate of their

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to "maximize the ability of minor parties to develop popular support." State Br. 33.

[15] It is useful to distinguish two ways in which facially neutral election rules might disproportionately burden minor parties: (1) by imposing general requirements (*e.g.*, on signature gathering or other antecedents of ballot access) that are intrinsically more difficult for minor parties to meet because of their lesser capacity; (2) by imposing limits on party activity, compliance with which is essentially costless in itself, which have far more damaging consequences for minor parties than major ones. The Minnesota statute challenged here is of the second kind. *See Anderson, id.*

choice; (2) the right to communicate that choice on the ballot on terms equivalent to those offered other parties, and the correlative right of supporters to receive that communication on those terms; and (3) the right to make that communication on a separate ballot line.[16] We first adumbrate these rights, and then address the burden imposed by the challenged law.

II. THE STATE'S BAN ON FUSION DIRECTLY ABRIDGES AND SEVERELY BURDENS CORE FIRST AMENDMENT RIGHTS.

A. A Political Party Has A Core First Amendment Right To Nominate The Candidates Of Its Choice.

A party's right to choose its "standard bearers" — to nominate the candidates chosen by its members — has been repeatedly recognized by this Court as *fundamental*, and as enjoying core first and fourteenth amendment protection.

This Court unanimously and emphatically made this point in *Eu v. San Francisco County Democratic Central Committee*:

> Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association, and to select a "standard bearer who best represents the party's ideologies and preferences." . . . Depriving a political party of the power to endorse "suffocates that right . . . at the crucial juncture at

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[16] Although this Court's conclusion about the constitutionality of Minnesota's ban — which bars fusion with or without separate ballot lines — does not depend on the right to a disaggregated ballot, we submit that a separate ballot line or vote count *is* constitutionally mandated. *See* II.C., *infra*.

> which the appeal to common principles may be translated into concerted action, and hence to power in the community."

489 U.S. at 224 (citations omitted). Quoting from the dissent in *Tashjian v. Republican Party of Connecticut*, this Court explained further that:

> Freedom of association . . . encompasses a political party's decisions about the identity of, and the process for electing, its leaders . . . . The ability of the members of a [political party] to select their own candidate . . . unquestionably implicates an associational freedom.

489 U.S. at 229-30 (citations and internal quotations omitted). Indeed, this Court had already observed in *Tashjian* that:

> Were the state to . . . provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition on potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals . . .

479 U.S. at 215. And Justice Scalia, joined by the Chief Justice and Justice O'Connor, while dissenting from the majority's holding on the particulars in *Tashjian*, acknowledged that a state law restricting "the ability of [party] members to select their own candidate . . . *unquestionably* implicates an associational freedom," as would a state law "restricting the ability of the Party's members to select *whatever candidate they desire.*" *Id.* at 235-36 (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting)(emphasis added).

These opinions cannot be reconciled with the State's novel and stingy suggestion that the organizational interests of political parties enjoy no direct protection under the First and Fourteenth Amendments, and that minor parties enjoy protection only insofar as they offer "alternative *candidates*." State Br. 14-15 (emphasis added).

The State's entirely candidate-centered view — for example, that Minnesota's fusion ban imposes no burden on the New Party's rights because its members can simply vote for the candidates the Party is barred from nominating on another party's line, or support its preferred candidate off the ballot (*id* at 18-19) — mistakes the Party for a mere interest group. A political party exists to compete for government power in electoral arenas. A party cannot create and develop itself if it does not itself appear in those arenas. Saying that the New Party should be content with supporting candidates without being in any way credited with that support on the ballot is like saying a corporation should be content to advertise products for *others* to benefit from their sale. If the State were to suggest that its Democratic and Republican parties show support for candidates merely by taking out advertisements without running them on their ballots, this Court would rightly declare the suggestion preposterous. The suggestion is no less preposterous as applied to a minor party.[17]

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[17] This Court most recently addressed the first amendment rights of political parties in relation to the rights of party members, of voters, and of the candidates parties select and support for election in *Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996). While the campaign finance context of the case led to divisions among the Justices, there was no division on the basic proposition that a party's expression of its views in pursuit of the "practical democratic task ... of creating a government that voters can instruct and hold responsible," through the party's autonomous choice of which candidates to support, is "'core' First Amendment activity." *Id.* at 2316 (Breyer, J., announcing the Court's judgment in an opinion joined by O'Connor and Souter, JJ.); *id.* at 2322 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in

And the State's related claim that barring a minor party from nominating "only" the few candidates who have been nominated by major parties imposes a *de minimis* burden (State Br. 19), misses entirely the constitutional force of the party's right to nominate *the* candidate of its choice (not simply *some* candidate), and of the party's right to a meaningful opportunity to participate in a winning electoral coalition — an opportunity essential to developing the party itself. While the number of potential candidates is close to limitless, the range of *viable* candidates typically is not; and choosing and advancing the *one* candidate it judges most viable for its purposes is at the very core of what a party interested in growing its influence is about. Any other view would surely have required the opposite result in *Norman*, where — in a decision subjecting the challenged regulation to strict scrutiny and striking it down — a unanimous Court rejected out of hand the State's defense that barring a new party from using the name of an existing party was *de minimis* since the new party remained free to choose any of an infinite number of other names.

B. The First Amendment Protects The Right Of A Party To Communicate Its Choice Of Nominees On The Ballot On Terms Equal To Those Offered Other Parties, And The Right Of The Party's Supporters And Other Voters To Receive That Information.

In partisan elections, a party's choice of nominees is typically communicated on the ballot itself. This communication helps the nominating party mobilize supporters to vote for its candidates by identifying them as its candidates.

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judgment and dissenting in part); *id.* at 2331 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part); *id.* at 2332 (Stevens, J., joined by Ginsburg, J., dissenting). As Justice Thomas, joined by the Chief Justice and Justice Scalia, put it, "the danger to the Republic lies in Government suppression of such activity." *Id.*

It is a critical source of information for the great majority of voters, who typically know more about the ideals and values of the parties than of particular candidates, and who accordingly rely upon party "labels" as a voting guide.[18]

This case does not present the question whether, in general, states have a constitutional obligation to identify candidates for office by such party labels. Once a state chooses to provide such labels for one or more qualified nominating parties, however, it is obligated under the First and Fourteenth Amendments to provide them on equal terms for all. To provide this communicative opportunity to some political parties but not others is a constitutionally unacceptable departure from state neutrality in electoral competition — here, a departure all the more constitutionally offensive because it turns on the political association and identity of the party's chosen nominee. *Rosen*, 970 F.2d at 175; *Murphy v. Curry*, 70 P. 461 (Cal. 1902).[19] *Cf. Meyer v. Grant*, 486 U.S. 414, 424

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[18] The importance of such labels was recognized by this Court in *Tashjian*, 479 U.S. at 220 (party labels provide a shorthand designation of the views of party candidates on matters of public concern, and thus play a role in the process by which voters inform themselves for the exercise of the franchise). It was also observed by both experts and the court of appeals in *Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992) ("[the] use of a name and a label allow[s] people to make a connection between the candidate and his platform and to create an identification in the voter's mind ... at the crucial moment of choice in the election campaign.") *Cf. Riddell v. National Democratic Party*, 508 F.2d 770, 775 (5th Cir. 1975) (ability of new faction of the Democratic Party to express its affiliation with that party *on the ballot* had a "substantial political effect" on the new party's organizational efforts and electoral success).

[19] In *Murphy*, the California Supreme Court applied precisely this rationale to strike down a fusion ban under the state constitution. While obviously not binding on this Court, that court's opinion may be of interest here:

> It may be that in the ideal democracy, where intelligence is universal and knowledge widespread, the state, if it adopted the

(1988)(once a state has authorized citizen ballot initiatives by statute, the fact that it was not constitutionally required to do so does not authorize it to limit discussion of political issues raised in initiative petitions); *Widmar v. Vincent*, 454 U.S. 263 (1981)(having created a forum generally open for use by student groups, university may not exclude particular political group without satisfying constitutional test).

The State's argument — that the Party's having its name identified with the candidates it nominates is mere "expression" for which, after *Burdick* the ballot is not recognized as a constitutionally mandated vehicle (State Br. 32-33) — is wrong for several reasons.

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secret ballot, would do no more than print the designation of the offices to be filled, leaving blank spaces for the voters within which they could indicate the man or men of their choice. But under our system the state has gone much farther than this. It has recognized the existence of different political parties ... has prescribed rules and regulations touching the form and matter of the official ballot, and upon that official ballot has arranged that political parties and their nominees shall have their appropriate places, and that there shall be conveyed to all the voters the information as to each nominee that he is the chosen candidate of at least one political party. But having gone so far, and having made of itself an information bureau, it becomes the duty of the state to convey information that is exact,—that is fair to all political parties, and fair to the nominees of all political parties, as well as fair to the voters at the polls...

It certainly must be true that a political party ... may nominate whomsoever it pleases for any office, provided that person have the proper legal qualifications. It is a drastic interference with the rights of such political parties to refuse any recognition to any of its nominees because, and only because, some other political party has likewise seen fit to nominate him.

70 P. at 463.

First, it overstates *Burdick* itself, which held only that the claim of an individual voter to use the ballot "to voice. . . generalized dissension from the electoral process" by casting a write-in protest vote, 504 U.S. at 441, was overborne by the State's administrative concerns. *Burdick* does not hold that the ballot serves no expressive function, only that this function is not so general as to sustain solicitude for such petty protest. It is inconceivable that this Court intended its decision in *Burdick* to dismiss the widely recognized function of the ballot as a means of permitting voters — in the aggregate — to use their votes — meaningfully — to "send a message" about policy preferences, and thereby to advance their shared political goals.

Second, the fusion ban interferes with the message sent to voters by the party, in the voting booth, that it has nominated a particular candidate, and it does so despite the fact that the State otherwise uses its ballot system for precisely this purpose. *Burdick* leaves untouched the premise, most clearly articulated in *Rosen*, *supra*, that the State is required to accord this right to every qualified party if it grants it to any. To provide ballot content for some qualified parties while suppressing it for others (based on the political affiliations of their chosen candidates) is nothing but censorship.

Finally, it is simply not the case that a party's nomination of a candidate on the ballot with its own label serves a merely "expressive" function (State Br. 32-33), or that Minnesota does not use ballot results to measure a party's support. State Br. 26. Tallies on party-identified ballot lines are almost universally used — as they are in Minnesota[20] — to determine the party's continued access to the ballot. For a political party, it is impossible to imagine a more critical and

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[20] Minn. Stat. § 200.02 subd. 7.

substantive function. This is not a use of the ballot for mere "expression," and certainly not for "generalized dissension from the electoral process." The party's very existence as a party with ballot status may be at stake. *See infra* at III. C.

C. The First Amendment Also Protects The Right To Nominate Candidates On A Party's Own Ballot Line.

By denying minor parties any right to communicate their choice of candidate on the ballot, Minnesota's fusion ban *a fortiori* denies their right to do so on their own ballot line. But contrary to the State's repeated implication,[21] and as the fallback law enacted in the wake of the decision below suggests,[22] recognition of a right to fusion does not *ipso facto* require separate ballot lines for jointly-nominating parties. While "fusion" ballots have nearly always featured such separate lines, with votes cast for the fusion candidate on each line counted separately and then combined in the candidate's total vote vis-a-vis rivals, an "aggregated" ballot, in which the jointly nominating parties share a common ballot line, is certainly conceivable.

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[21] State Br. 3, 6, 8, 10, 14, 21-22, 25, 38, 42, 45.

[22] Minnesota's 1996 fallback law, in effect since April 2, 1996, but written to expire automatically if the Court of Appeals' decision is reversed, mandates a fusion ballot on which the labels of all the parties nominating a given candidate appear with that candidate's name in one place on the ballot, precluding any separate count of the minor party votes. State Br. App. B. The statute also forbids crediting any votes cast on such a fusion line toward the qualification of minor parties for ballot status — without similarly discrediting their use for that same purpose by major parties! State Br. App. B-3. If there is little dispute about the anti-minor-party animus of Minnesota's legislature in 1901, there can be none about its animus in 1996.

But while a decision invalidating Minnesota's blanket ban, which bars fusion with or without a separate vote count, does not require a finding that such a count — and the separate ballot line that would support it — is constitutionally mandated, there are compelling reasons for the Court to hold that in fact it is.

First, party labels are not only an important source of information for voters to *receive*. The votes cast on the *basis* of those labels are also indispensable information sent *from* the voters, facilitating the effective functioning of our political system. The right of citizens to convey that information is fundamentally protected. For candidates, officeholders, and other policy-makers (and voters), knowing which party programs enjoy support in the electorate, and the level of that support, provides the most basic sort of democratic instruction. It tells them what the people want them to do.[23] But if votes cast on the basis of one partisan affiliation are mixed together with votes cast on the basis of another, that instruction cannot be conveyed clearly. The voice of the people is artificially slurred.

Again, to suggest that the protection of the right of people to be heard and heard clearly does not survive *Burdick* is fundamentally to confuse the holding in that case. It is one

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[23] Reciprocally, a disaggregated ballot permits more precise signalling from voters to elected officials. As Judges Ripple, Posner, and Easterbrook, assuming such a ballot, noted in their dissent in *Swamp*, 950 F.2d at 389:

> If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and the major party.... Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor.

thing for the Court to find, as there, that a state had no obligation to broadcast a single write-in vote for Donald Duck. It is quite another to deny the supporters of a political party — having already shown sufficient organization and strength to qualify for access to the ballot and to secure the nomination of candidates on that ballot — the ability to demonstrate the dimensions of their strength in the general electorate. Without the opportunity to make such a demonstration, their fair opportunity to advance their aims through their party is fundamentally frustrated, and information on voter preferences and beliefs — just how many voters support which sort of program — is distorted.[24]

With separate ballot lines, these frustrations and distortions are immediately relieved. Voters can show their support clearly; participants in the electoral system — candidates, voters, and the political parties themselves — get the benefit of accurate information on the distribution of popular sentiment. And elected officials and other policymakers receive a precise "democratic instruction," making the achievement of a representative government "of the people, by the people, for the people" — the "republican form of government" guaranteed by Article IV § 4 — that much more likely. Separate ballot lines thus reduce the burden on core rights while rendering the entire electoral system more consistent with our Constitution's basic structure.

A second and independent reason to require separate ballot lines arises from the way that party ballot status is

[24] Contrary to the State's implication (*see* n.21 *supra*), a separate vote count will not necessarily advantage minor parties in every case. Where the minor party contributes only few votes to the candidate's total, both that candidate and the public learn as much, and the prestige of the party is correspondingly diminished. Just as a party whose vote count is consistently impressive will grow stronger, a party whose vote count is consistently low will likely fail.

determined in Minnesota (and virtually all other states): through party vote totals in selected state elections. Without ballot disaggregation, parties offering fusion candidates in those elections will not be able to show their specific vote totals, and will thus fail to satisfy ballot maintenance requirements.[25] In effect, exercising the right to fusion will be "unconstitutionally condition[ed] on a party's willingness to

[25] This problem might be addressed through artificial accounting devices — assigning all the votes on the fusion line (1) to the major party, (2) to the minor party, (3) to both, (4) to neither, or (5) upon some basis other than what actually happens inside the ballot box itself — but each of these options is gravely flawed. *See* Note, "Fusion Candidacies, Disaggregation, and Freedom of Association," Note, 109 *Harv. L. Rev.* 1302, 1336 (1996):

> The first two options would be difficult to square with a concern for equal application of the law. Each would establish a seemingly arbitrary classification of votes to the detriment of one side of an electoral coalition. Assuming a system of consensual fusion only, the first, second, and fourth options would likely have the practical effect of deterring all fusion candidacies. Attribution of all votes to the *major* party would remove much of the incentive for a minor party to choose fusion. Attribution of all votes to the *minor* party would probably be viewed as undesirable and would likely weaken the major party; this option lowers the latter's incentive to consent. Attribution of the votes to *neither* party would compound these disincentives, and effectively condition fusion on the willingness of each party to forego the opportunity to claim a candidate as its own. At the least, under the fourth option, no party would ever consent to fusion in an election that is used to satisfy statutory ballot status requirements. The second and third options both suffer from the flaw identified by the *Swamp* court that minor parties would be encouraged to "leech onto" support generated by the senior partner in the electoral coalition.

And any version of the fifth option would defeat the basis of vote-dependent ballot laws — which is in fact to tie ballot eligibility to actual electoral performance.

forego sustained ballot access." *See* Note, 109 *Harv. L. Rev.* at 1334-36.

Separate ballot lines avoid this problem simply and effectively. Aggregated for purposes of determining which candidate wins, votes cast on different fusing parties' ballot lines would be credited to those parties, respectively, in determining their satisfaction of ballot maintenance requirements.[26]

D. Each Of These Rights Is Severely Burdened By Minnesota's Fusion Ban.

Where a minor party seeks as its standard bearer a candidate also nominated by another party, Minnesota's fusion ban forces the party to choose between its right to select its standard bearer and its right to communicate its choice (and for its supporters and other voters to receive that communication), on the ballot, on terms equal to those offered to other parties. The fusion ban effectively declares that a minor party may select as its standard bearer a candidate also nominated by another party — but only if it does not signal that choice on the ballot. Alternatively, a minor party may communicate a choice of candidate on the ballot — but only if it does not select as its nominee the candidate it wants. *Cf. West Virginia Board v. Barnette*, 319 U.S. 624, 634 (1943); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977). The Constitution does not permit imposing such a choice between constitutional rights. *Simmons v. United States* 390 U.S. 377, 394 (1968); *cf. New York v. United States*, 505 U.S. 144, 174-76 (1992).

[26] The State's claim that there is something wrong with counting fusion votes toward ballot status is incorrect. *See infra* at III.C.

Either limitation on a political party's freedom is crippling to political efficacy. Parties exist to compete for government power, on political programs for the use of that power, in elections in which they mobilize supporters around candidates they judge best able to advance those programs. For the State to deny a party the ability to choose the candidate it considers best qualified to advance its program unquestionably burdens severely a core right of political expression, association, and petition. It interferes with party autonomy at precisely the point at which the exercise of that autonomy becomes real — through selection of the candidate the party judges best able to advance its aims. It would be hard to imagine a more fundamental interference with the basic goals and functions of a political party.

Equally, for the State to forbid a party to identify, at the ballot box, its chosen standard bearer as its own nominee disrupts the most important communication the party makes to its supporters and potential supporters — the communication of the identity of the candidate for whom the party urges its supporters, *as* supporters, to vote. By detaching voting support of candidates from the partisan affiliation of such candidates, such state action also destroys the most important means by which a party can show its real base of popular support — by showing the number of votes cast on a ballot line identified with it. Nothing could be more threatening to a party's ability to grow or exert influence in policy debate — to further the associational rights and aims of its members and supporters.[27]

That Minnesota burdens these rights "only" in the case of joint nomination does not in the least relieve the severity of

[27] And, as our discussion of the history of fusion legislation demonstrates (*supra* at pp. 5-10), precisely these effects of fusion bans are well documented.

the burden in such cases.[28] And, in any event, whether or not to pursue joint nominations with other parties is a matter for the party itself, not the State, to decide. What else can a right of "political association" mean in this context but a right to decide whether or not to *associate* oneself with another in the choice of a common standard-bearer? If the New Party seeks to advance its influence through fusion, neither more nor less than if the Republican Party of Connecticut seeks to advance its influence by opening its primary, *see Tashjian, supra*, it is not for the State to bar that practice or to condition its exercise on the surrender of other core freedoms.

It is also beyond controversy that fusion is of far greater value to minor than to major parties[29] — and

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[28] *See also Anderson*, 460 U.S. at 791 n.12 (that five candidates representing "ideologically committed minor parties" qualified despite early filing deadline did not diminish the burden imposed by the deadline on *Anderson's* more pragmatic supporters who, unlike the supporters of the "ideological" parties, had a political interest in awaiting the outcome of the major party campaigns); *cf. Meyer v. Grant*, 486 U.S. at 418 n.3 (that Colorado ranked fourth in the nation in number of initiatives placed on the ballot did not negate the fact that the challenged prohibition against the use of paid circulators inhibited the plaintiffs' ability in that case to place *their* initiative on the ballot); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992)(plurality opinion by Justices O'Connor, Souter, and Kennedy, JJ.)(severity of a law's burden must be measured with reference to the subset of persons whose rights the law in fact burdens, not the set of all whom the law potentially governs).

[29] At various points in its brief, the State questions the relative importance of fusion to minor parties. It notes that factors other than fusion bans also contributed to the decline of minor parties in the 20th century, that the existence of a fusion option does not guarantee significant minor party activity, and that, in a few instances, significant minor party activity has at least briefly flared in a non-fusion setting. State Br. 26-28. The State's claims are overstated — and irrelevant. First, the State cites a total of two successful minor-party state candidacies in two states where fusion is assertedly banned, purporting to show that minor parties do not need fusion. *Id.* at 27. In fact, the candidate in one of the two states (Don

reciprocally, that a general ban on fusion hurts minor parties much more than it hurts others.[30] It strengthens the grip of two-party dominance — and does so not just for *any* two

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Gorman of New Hampshire), along with a second minor party candidate (Jim McClarin), were elected in 1994 to the New Hampshire State Legislature as the result of write-in fusion (STATE OF NEW HAMPSHIRE MANUAL FOR THE GENERAL COURT, NO. 54 (1995) at 201, 209, 302-03, 299), which *is* permitted in that State. S. Cobble & S. Siskind, FUSION: MULTIPLE PARTY NOMINATION IN THE UNITED STATES, 29-30 (1993). In addition, the State missed the Vermont example of Thomas Salmon, who ran for governor and won in 1972 and 1974 as both a Democrat and an Independent Vermonter, CONGRESSIONAL QUARTERLY GUIDE TO ELECTIONS, 2d Ed., at 532 (1985); as well as that of Vermont's Secretary of State James H. Douglas, who ran as a fusion candidate in three out of six elections. Cobble & Siskind, at 44.

In any event, the State nowhere directly contests any of the New Party's amply documented historical and analytic claims: that fusion is more important to minor than major parties, and that its ban burdens minor parties disproportionately; that fusion was essential to the practice of 19th century minor parties, themselves far more organizationally mature and successful than most minor parties today; that fusion bans were a major cause of minor party decline in the 20th century; that the bans were enacted with the specific goal of suppressing minor parties; that no minor party traditions have survived at the state level in the 20th century except in states permitting fusion. *See* pp. 5-10, *infra*; and Amicus Brief of Twelve Professors.

[30] This is not to say that major parties are not *also* deprived of important opportunities and rights whenever fusion is banned. But it is no mystery why the major parties might join forces to enact such a ban despite their resulting deprivation. Whenever such a ban is enacted, it seems a safe assumption that major parties, contemplating the effects of the availability of a fusion right, calculate their lost ability to expand their electoral base — by making common cause with a minor party from time to time — as outweighed by the expected benefit of preventing all minor parties from fielding fusion candidates — and thus enhancing their longrun ability to become genuine threats. Rigging the rules of the political game in advance can thus serve the interests of the major parties even while it sacrifices their rights.

parties, but typically for the Democrats and Republicans. *See Williams v. Rhodes.* This is precisely the sort of facially neutral but factually skewed regulation struck down in *Anderson.*

Finally, and obviously, an absolute ban on fusion is also, by necessity, a ban on disaggregated ballots. In a fusion system, the right to such a separate vote count — otherwise recognized in Minnesota for all qualified parties in all partisan elections — is completely abrogated.

III. THE INTERESTS ASSERTED BY THE STATE DO NOT EVEN REMOTELY JUSTIFY THE FUSION BAN.

The State argues that its absolute prohibition of ballot fusion is justified by its interest in reducing voter confusion, enhancing political competition and diversity, eliminating distorted election results, and avoiding factionalism. Each of these contentions is unpersuasive.

A. Fusion Does Not Increase, And The Fusion Ban Does Not Reduce, Voter Confusion.

The State's claim that the fusion ban reduces voter confusion by keeping the ballot short and simple, while "[f]usion invites the development of longer and more complex ballots" (State Br. 42), need not detain the Court long.[31] Although the State cites the ambiguous observation of a Minnesota political scientist in the late 1950s that it was "somewhat confusing" that, over the course of a 30 year career, Fiorello La Guardia appeared at one time or another

[31] The State's added contention that fusion might cause "confusion" by permitting minor parties to maintain ballot status *(id.)* is treated in subsection III.C., *infra*, in reply to the State's concerns about electoral "manipulation."

on the ballot line of 9 different parties (*id.* at 43), its theory is entirely speculative and unsupported by the undisputed historical record. This hypothesized confusion has never resulted, and there is no reason to believe it ever will.[32]

[32] Indeed, the evidence in this case is directly to the contrary. Professor Burnham's unrebutted declaration reviews the history of fusion's widespread practice in the 19th century — by an electorate much less educated than it is today — and in states where fusion is currently permitted, and concludes unequivocally that "there is no evidence in the literature on 'fusion' politics that multiple party nominations have caused confusion among voters." Burnham Decl. J.A. 17. *See also* Amicus Brief of Twelve Professors; Brief of the Conservative Party of New York and Liberal Party of New York, as Amici Curiae in Support of Respondent ("Amicus Brief of New York Parties").

The State claims exemption from any burden to substantiate its "confusion" concern based on this Court's decisions in *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1968), and *Burson v. Freeman*, 504 U.S. 191, 206, 208-09 (1992). These cases, however, create no such gaping exception — with respect to confusion or with respect to any other supposed election-related evil — to the general rule that, even in cases involving no more than intermediate first amendment scrutiny, the State bears the burden of showing that the interests it asserts are real rather than hypothetical. *See United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1015-16 (1995)("limited evidence" insufficient); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)("speculation or conjecture" not enough); *Colorado Republican Campaign Committee, supra*, 116 S.Ct. at 2317 (Breyer, J., announcing judgment, joined by O'Connor and Souter, JJ.); *id.* at 2331, (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.) (concurring in judgment and dissenting in part).

To be sure, the State's evidence may draw upon the logic of the situation — bolstered, where necessary, by the corroborative experiences of other jurisdictions. *Cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986). Thus, Minnesota need not *itself* experiment with fusion, and risk suffering the very harms it says it seeks to avoid, in order to meet its first amendment burden. But in *Burson*, every one of the fifty states had long since abandoned unrestricted access to polling places — after actual experience, in some of those states, of voter intimidation. Moreover, the plaintiff in *Burson* did not question the need for a restricted zone, but

In any event, if confusion first arises from imperfect information, the fusion ban does nothing to relieve it. For it restricts the flow of truthful information to voters by forbidding the full use of ballot labels to give voters indisputably relevant facts about which parties support which candidates — facts that fusion permits voters to acquire. The State's claim that such labels would mislead voters echoes the argument made by Connecticut in *Tashjian* — that voters would not understand what a candidate stood for if the Republican Party were permitted to open its primaries to independent voters. This Court rejected that argument, observing that:

> To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues."

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argued only that a zone with a radius smaller than Tennessee's 100-foot restricted zone would serve that State's purpose. In this circumstance, this Court merely held that Tennessee could meet its burden on the basis of "common sense" without empirical proof that the 100-foot zone, rather than a zone of some smaller radius, was needed.

Equally, *Munro* merely holds that, if demanding proof of a given sort would force "a State's political system [to] sustain some level of damage before the legislature could take corrective action," such proof is not demanded where the legislative "response is reasonable and does not significantly impinge on constitutionally protected rights." 479 U.S. at 195-96. But it certainly does not follow that the State can meet its burden here by simply *asserting* that permitting fusion would injure Minnesota or its voters, in the face of contrary experience where fusion has been permitted.

479 U.S. at 220 (citations omitted). Indeed, this Court has repeatedly warned against justifying state regulations restricting core first amendment freedoms on the ground that they would "confuse" individuals with too much information:

> A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is true "that the best means to that end is to open the channels of communication rather than to close them."

Id. at 221, *quoting Anderson, 460 U.S.* at 798; *cf. 44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495, 1511-12 (1996); *Linmark v. Town of Willingboro*, 431 U.S. 85, 94-97 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Having the State keep voters in the dark about who supports whom is hardly what most people have in mind when they extol the virtues of the "secret" ballot.

Certainly, the State's ostensible fear that fusion would generate "laundry lists" of candidates is baseless, not just empirically but analytically. As the State argues elsewhere, fusion *per se* would not add candidates in any given race. State Br. 19-20. And, to the extent that fusion would encourage the creation and development of new political parties, the State may not legitimately deem this a "problem," provided parties lacking a serious level of support are weeded out through constitutionally acceptable petition, or past performance, requirements. *See Munro, supra.*[33]

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[33] The State's reliance on *Lubin* (State Br. 43) is misplaced. While *Lubin* indeed recognizes that states have an interest in avoiding "laundry

The speculation that individual candidates might use fusion to secure multiple ballot listings purely to gain "undue" attention or to associate their names with popular slogans on the ballot (State Br. 42), while "theoretically imaginable," *Williams v. Rhodes*, 393 U.S. at 33, is both extremely unlikely and at best problematic as a basis for state regulation. It is unlikely because such manipulation by a candidate would require a considerable diversion of resources and energy (funds, volunteers, and the like) from the candidate's campaign within his or her "home" party to satisfy ballot access requirements for the sham party. Such manipulation can be made even more unlikely by the less restrictive measure of adjusting the State's ballot access requirements to ensure against it. And any remaining danger is far too remote to justify the *immediate and certain* effect of the ban on the rights of parties, like the New Party, whose *bona fides* as parties are not disputed. *Id.* at 33; *see also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. at 95-98.

Finally, the prospect that single-issue interest groups might use fusion to influence major-party platforms — whether plausible or not, and whether regrettable or not — cannot possibly justify a fusion ban. Indeed, the underlying interest — essentially an interest in regulating the content of a party's platform — is itself illegitimate. The court of appeals' decision affirmed by this Court in *Tashjian* addressed

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list" ballots, the "laundry lists" referred to are lists of candidates without either a serious interest in running for office or a serious chance of success. All *Lubin* holds is that states may not advance this interest by insisting on a filing fee that a serious candidate cannot afford without offering a reasonable alternative for proving seriousness (*e.g.*, a showing of signature support). 415 U.S. at 715. Here, there is no issue either about the seriousness of the candidate the New Party wants to nominate, or about the Party's satisfaction of the objective ballot access requirements imposed by Minnesota law.

the point directly:

> In effect Connecticut professes to have a compelling interest in deciding the ideological slant and bases of support for a political party. Most decidedly, however, it is the prerogative of the political party — and not the state — to determine whether it should be structured as a broad-based, relatively non-ideological organization or as a closely knit, strongly ideological unit. The mere incantation of a talismanic phrase such as "voter confusion" cannot transform a specious interest into a compelling one.

Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 284 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986).

B. Far From Reducing Competition, Fusion Contributes to Political Diversity, Which The State Cannot, In Any Event, Simply Mandate.

Having identified political diversity as one of the core values served by the First Amendment, the State mistakenly equates *political* diversity and electoral competition with *candidate* competition. For the State, the "marketplace of ideas" literally is the "marketplace of candidates." And because, in its view, fusion does not contribute to the marketplace of candidates, it cannot contribute to the marketplace of ideas. Fusion is therefore unprotected activity and, reciprocally, an absolute ban on fusion — allegedly promoting political diversity, again by promoting candidate competition — is justified. (State Br. 44-45)

This argument is, by turns, illogical and offensive to bedrock constitutional values.

First, the "marketplace of ideas" means many things other than the range of available candidates, and political

organizations can contribute much to that marketplace without contributing new candidates.[34] They can identify previously neglected issues, develop program suggestions around those issues, mobilize blocs of voters in support of those suggestions, maintain those blocs over time through their organization, and in myriad other non-candidate-based ways help diversify public debate and political action. Minor parties do just these things all the time. If fusion helps minor parties — and the State does not seriously contest the fact that it does — then fusion contributes to the marketplace of ideas. Indeed, the State itself cites Professor Burnham's declaration asserting that fusion *promotes* political diversity. State Br. 5.

Second, and again uncontested by the State, the actual practice of fusion has of course *increased* the number of candidates. By improving the general acceptability, endurance, and strength of minor parties, it improves their ability to mount their own candidacies. While the literal act of fusion does not itself add to the candidate pool, the incorporation of fusion in a strategy of minor-party building has the effect, through success in that building process, of increasing the pool indirectly. Few if any of the minor parties in New York

[34] In the same vein, the State argues (State Br. at 20) that a fusion nomination on the ballot provides voters with useless information — that knowing that major and minor parties agree on someone or something is unimportant. This is at best a bizarre claim and indeed borders on the absurd. In any survey of the political landscape and the political identities and strategies it contains, identifying points on which leaders of parties *agree* is every bit as useful information for voters as isolating points on which they *disagree*. The level of "bipartisanship" evident in United States foreign policy, for example, or on approaches to the deficit, is every bit as relevant to voters as is the level of disagreement among the major parties. It tells voters what the real boundaries of political debate are. *See Swamp*, 950 F.2d at 389 (Ripple J., joined by Posner and Easterbrook, JJ., dissenting from denial of rehearing *en banc*). There is no reason why this should be any different for minor/major party agreement on candidates, despite residual disagreement on programs.

believe they would survive for long without fusion.[35] All the non-fusion candidates that such survival permits, then, should be "credited" to a candidate diversification that otherwise would not take place. Indeed, historically, and again uncontested by the State, minor party activity in the latter part of the 19th century — with all the non-fusion candidates it produced — would not have been possible without fusion. *See* Argersinger at 288.

Third, the challenged ban does not in any event *itself* promote candidate diversity, since one likely option left to a party under the ban is to nominate *no one* at all. If the State has a legitimate interest in candidate diversity, the fit between this interest and the challenged regulation is close to non-existent.

Fourth, invoking a state interest in candidate diversity to justify a restriction on freedom of nomination is incompatible with the First Amendment, which clearly forbids state efforts to orchestrate the electorate's menu of choices by suppressing the *actual* choices made by the State's citizens through their political parties. *See Republican Party v. Tashjian*, *supra*, 770 F.2d at 284. Surely no wish to channel voters into ostensibly "overlooked" directions can justify forcing a minor party to nominate a second-choice candidate when its members believe that another candidate would better advance their goals. Yet the fusion ban does just this.[36] The

[35] See Amicus Brief of New York Parties.

[36] It is as if the State, deeming a new party's nominee too similar ideologically to someone already nominated, or too familiar to voters from prior elections in which the party's nominee had run or from prior offices the nominee had held, were to invoke an interest in diversity of candidates to insist that the new party either nominate no one at all or select a second-choice candidate the major parties have "overlooked" so as to offer the voters "a choice, not an echo."

State erroneously equates the *ends* served by the First Amendment with the *means* tolerated by it. Political and ideological diversity are conditions we can hope will be achieved through vigorous, uninhibited debate and political rivalry. *New York Times v. Sullivan,* 376 U.S. 254 (1964). But that hope provides no justification for state orchestration of, or interference with, a party's right to nominate — the exercise of which, perhaps more than the exercise of any other right, defines what a political party *is*.

C. Fusion Does Not Produce, And The Fusion Ban Does Not Relieve, Electoral Distortions.

The State argues that two potential "distortions" of the

Imagine what one would think if the State were to say that, in the interest of presenting voters with a wider menu of choices and in the interest of reducing their confusion, candidates on the ballot for electoral office may be designated "LEFT," "LIBERAL," "MODERATE," "CONSERVATIVE," "RIGHT," or "NON-IDEOLOGICAL," but that, once a candidate for a given office has been designated with one of these labels, no other party's nominee may be listed with the same designation. Under such a system, once a nominee (whether Mr. Dawkins or someone else) had been listed, say, as LIBERAL by the DFL, the New Party and Mr. Dawkins would either have to designate him as LEFT, or select an alternative candidate for whom that designation would seem acceptable. To the claim of the New Party that this is an unacceptable choice and that it has a right to have this candidacy labeled in accord with the political views of the candidate, the party, and the party members who selected him as their standard-bearer, the State would respond, "Sorry, the LIBERAL label is already spoken for. We're not denying you the right to vote for a liberal, or to list another nominee, but our citizens are entitled to diversity, not just one liberal after another, and are entitled to avoid the confusion that duplicative and overlapping ballots entail." Surely any such assertion by the State would be seen at once for what it is: a naked, and nakedly unconstitutional, attempt to manipulate information in the supposed interest of the people. What Minnesota is doing here is no better, and perhaps worse. Even if it were not born of a motive to reduce rather than enhance voter choice (*but see supra* at 7-8 & nn. 7&8), it could not be sustained.

ballot make the fusion ban necessary: "raiding" of a small major party's primary *by an "established major party"* (State Br. 45) to gain short-term political advantage; and the nomination *by a minor party* of a popular major party candidate simply to obtain major party ballot status. *Id.*

As regards the first "distortion," the Minnesota ban is not even rationally related to an interest in preventing this eventuality. The reason is that, although the Minnesota election code bars fusion both by major parties — defined in Minnesota to include all parties that have won 5 percent of a statewide vote — and by parties (like the New Party) which have not yet qualified as "major," it does so through different provisions altogether. Major party fusion is barred by § 204B.04 subd. 1, a statute that was not challenged and could not have been challenged by the minor-party plaintiff in this case because it applies *only* to "major" parties. *See* Pet. App. 10. "Minor" party fusion is barred by Minn. Stat. §§ 204B.06 subd. 1(b) and 204B.04 subd. 2. These statutes *were* challenged in this case, and were struck down by the court of appeals as unconstitutional.

While the State might theoretically attempt to defend its *major* party fusion ban on the ground that it would prevent the victimization of a small "major" party by a larger one in the party primaries, it cannot claim that the *minor* party fusion ban advances this interest because minor parties, being ineligible under state law to participate in the State's open primaries (Minn Stat. §§ 204B.03 and 204B.07), are not even *theoretically* vulnerable to the primary party-raiding the State purports to fear.[37]

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[37] Minor party nominations in Minnesota are also unregulated, and therefore minor parties are free, by their party rules, to exclude non-members from voting in whatever nomination procedure they devise, again avoiding altogether any "raiding" problem.

The second "distortion" identified by the State is that a minor party might bootstrap its way to "major party" status by nominating a popular major-party candidate. State Br. 42, 45-46. First, this concern arises only where the different fusing parties are permitted separate ballot lines. It cannot begin to justify Minnesota's absolute fusion ban, which prohibits fusion even without such ballot disaggregation, and in which the "bootstrap" problem therefore does not exist even in theory. *See* II.C., *supra*.

But in fact, even in a disaggregated ballot system, this "problem" is not a legitimate problem at all. There is nothing illegitimate about "crediting" votes cast on the separate ballot lines of fusing parties toward the satisfaction of their respective ballot-access requirements. The State's argument that fusion in essence amounts to theft by the minor party "of the strength of a candidate of another party" (State Br. 31) is fundamentally wrong-headed because it ignores altogether the uncontroverted effects of the "wasted vote syndrome." *See* pp. 8-10, *supra*. Where minor party supporters choose as their standard bearer someone also nominated by another party and

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Even if the fusion ban at issue *did* apply to small "major" parties, the State's interest in preventing party-raiding would still not justify it for several reasons. First, Minnesota's open primary laws — in which any voter may participate regardless of party affiliation or loyalty — suggest that preventing raiding has not been a major concern of the State Legislature. Second, there are less restrictive ways to deal with any such problem. New York, for example, protects minority parties against take-over by outsiders by requiring consent of the minor party's governing body to the candidacy of any non-member. NEW YORK CONSOLIDATED LAWS, ELECTION LAWS, Article 6, §6-120(2,3)(party consent requirement). And, given *Democratic Party v. Wisconsin*, *supra* (state cannot mandate open primaries for Presidential delegate selection when party rules require closed primary), and *Tashjian* (state may not mandate closed primaries when a party wants to open its primary to independents), it appears that even a small "major" party could protect its primary process by resolving to exclude non-members from participation.

are intent on voting for that candidate, the fusion ban *forces* them to do so on the line of a party other their own. Their *forced* major party votes are the *real* stolen goods, which the relegalization of fusion simply permits the minor party to recover.

Clearly then, fusion creates not distortion, but greater clarity. The picture of electoral support that it permits, especially under a disaggregated ballot system, is on all accounts a truer and more accurate one than that provided under a fusion ban.

D. Fusion Does Not Splinter Parties, And The Fusion Ban Is Not Necessary To Prevent Such Splintering.

The State finally asserts (State Br. 46-49) that its fusion ban is justified by its interest in avoiding the "splintered parties and unrestrained factionalism" that this Court warned against in *Storer v. Brown*, 415 U.S. 724 (1974). But the ban is not even rationally related to any such interest; the interest itself could be served by a less restrictive alternative to Minnesota's absolute ban on fusion; and *Storer* provides no support for the argument the State purports to base upon it.

As to rational relation, there simply is none. This is a case asserting a right to fusion, not fission; to party alliance, not splintering; to consensual coalition, not bitter feuding. Nothing in Minnesota's fusion ban advances any interest in protecting party integrity, and no threat to that integrity follows from striking down the ban. How could it, when what the ban prohibits — and what striking it down would permit — is the free choice by parties of the electoral strategy that they judge most effective in advancing the interests of their members and supporters? What could be more deeply "splintering" of parties than denying them the ability to make that choice? What could more directly threaten the role of

parties as organizers of political competition and debate — and thus more clearly raise the spectre of "unrestrained factionalism" — than a statute forbidding them from acting on decisions about how they wish to perform that essential function?

As to less restrictive alternatives, the State *admits* that Minnesota's fusion ban is "somewhat broader than necessary to accomplish its asserted interests." State Br. 50. Given the fundamental character of the rights at issue, that admission alone should be fatal to any defense of the statute on the basis of its protection of party integrity, since a significantly less restrictive alternative means of advancing that interest is available: minor parties can simply be forbidden to nominate, as fusion candidates, candidates who have not consented to that nomination or whose "home" party objects to it.[38]

Finally, the State's reliance on *Storer* is utterly misplaced and unhelpful to the State's argument.

First, the facts and issues involved in *Storer* are fundamentally different from the facts and issues of this case. The plaintiff in *Storer* was a would-be independent candidate — not a political party — who claimed that the disaffiliation rule violated *his* personal right to *run* as an independent. The plaintiff in this case is a *political party* — not a candidate at

[38] Alternatively, and in New Party's view more wisely and constitutionally, a state could do what New York State has done, which is to require only the consent of the fusion candidate and the "non-home" (usually minor) party. This minimally restrictive alternative has been successful in New York in protecting against the only real dangers of an unregulated fusion system — nominations not welcomed by candidates, and major party raiding of minor parties — and has not led to party splintering. NEW YORK CONSOLIDATED LAWS, ELECTION LAWS, Article 6, §6-120(2,3). *See also* Amicus Brief of New York Parties.

all, independent or not — asserting its right to *nominate* the candidate of its choice. In *Storer*, the provision of California's election law that barred political parties from nominating certain candidates was not at issue — and could not have been, given the lack of standing of the candidate plaintiff to challenge that provision. *See* 415 U.S. at 726-27. Here, that is precisely the aspect of Minnesota's election law that is being challenged. *Storer* sustained a rule "designed to protect the parties and the party system against the disorganizing effects of independent candidacies." *Tashjian*, 479 U.S. at 224. What is challenged here is an election rule most charitably understood to protect parties against themselves, and then in ways that frustrate their ability to advance the clearly expressed interests of their members. *Storer* was fundamentally about the disrupting effects of "sore losers" and "Johnnies-come-lately" on the parties' own process of selecting candidates. This case is fundamentally about the State's power to disrupt that process itself.

Second, these differences are relevant — and in ways unhelpful to the State in assessing the relative burden on rights imposed by the *Storer* disaffiliation rule and the Minnesota fusion ban. The State argues that the restrictions on minor party rights upheld in *Storer* exceed those imposed by the Minnesota law challenged here. It observes, for example, that the disaffiliation rule upheld in *Storer* excluded more potential candidates from minor party consideration than does Minnesota's fusion ban. State Br. 35. And because those restrictions were upheld, the State reasons, Minnesota's law should be upheld as well.

Whether the State is right or wrong about *quantity* of candidates excluded under the respective statutes, it is certainly wrong in its conclusion. For it confuses the *quality* of the rights at stake in the respective challenges to those statutes. As this Court has repeatedly made plain, the rights of parties and their members — as against the rights of sore loser

candidates or of disgruntled individual voters — are *fundamental* in our constitutional scheme. And their *right to nominate the candidate of their choice* is perhaps the most fundamental party right of all — fundamental in the most direct textual sense in a way that the right of an individual to run as an independent candidate simply is not.[39] The right to nominate its candidate of choice is *constitutive* of what a political party *is* and of what it *means* for individuals to "assemble" in such a party — and through that assembly to exercise their individual and collective first amendment freedoms of "speech" and of "petition" through the electoral process. Thus, even the rights of individual voters — from whose rights the rights of parties derive — have been deemed overborne when they come into conflict with legitimate associational rights of parties.[40] The fact that it is the rights of parties that is at issue in this case and not the candidate "right" that was at issue in *Storer* is not a small distinction. It

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[39] *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (right to run for office not fundamental).

[40] *Tashjian* illustrates this principle in a footnote (479 U.S. at 215 n.6) distinguishing this Court's decision in *Tashjian* from an earlier decision in *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn.), *summarily aff'd*, 429 U.S. 989 (1976), in which it had *upheld* the same closed primary statute that it struck down as unconstitutional in *Tashjian*. The Court explained that it had upheld the statute when challenged merely by the unaffiliated voter in *Nader* because, at that time, unaffiliated voter participation was not welcomed by the political parties. It struck down the rule in *Tashjian* as applied to the Republican Party only after that party decided that it *wanted* such voters to participate in its primaries. *See also Rosario v. Rockefeller*, 410 U.S. 752 (1973), distinguished on the same basis in *Tashjian*, 479 U.S. at 215 n.6. Thus, in all these cases, it was the *party's* interest that made the difference. *See also Republican Party of Connecticut v. Tashjian*, 770 F.2d at 280; *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992); *Duke v. Cleland*, 1996 U.S. App. LEXIS 16632 (11th Cir. 1996); J. Guttman, "Primary Elections and the Collective Right of Freedom of Association." 94 *Yale Law Journal* 117, 120 (1984).

renders incoherent the comparison of burdens urged by the State, because the burdens are on rights held by this Court to have fundamentally different character and values.

Third, this Court has never read *Storer* in a way that would even suggest an analogy between the disaffiliation rule upheld there and the fusion ban challenged here. *Storer* itself, of course, had nothing to say about the effect of a disaffiliation rule on the right of a *party* to *nominate*. But this Court has visited the issue elsewhere, with *dicta* distinctly unhelpful to the State. In *Tashjian*, this Court analogized the closed primary law *overturned* in that case to an "affiliation rule" providing "that *only Party members* might be selected as the Party's chosen nominees." 479 U.S. at 215 (emphasis added). Such a law, the Court said, "would clearly infringe upon the rights of the Party's members under the First Amendment." *Id.* If this is so, then the First Amendment must similarly bar a rule providing that no *other* party's members *or nominees* might be selected as the Party's chosen nominees. That, in essence, is this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

August 29, 1996

Respectfully submitted,

SARAH E. SISKIND
Miner, Barnhill & Galland
44 East Mifflin Street
Suite 803
Madison, Wisconsin
(608) 255-5200

LAURENCE H. TRIBE
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

CORNISH F. HITCHCOCK
DAVID C. VLADECK
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

JOEL ROGERS
University of Wisconsin
Law School
Madison, WI 53706
(608) 262-4266

Counsel for Respondent

(13)

No. 95-1608

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and JOAN ANDERSON GROWE, Secretary of the State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

PETER M. ACKERBERG
Assistant Attorney General

1100 NCL Tower
445 Minnesota St.
St. Paul, MN 55101-2128
(612) 282-5712

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. RESPONDENT'S ARGUMENTS WOULD IMPROPERLY EXPAND THE SCOPE OF POLITICAL PARTIES' ASSOCIATIONAL RIGHTS.

Respondent presents its arguments for invalidation of the Minnesota ban on ballot fusion as if it calls merely for application of well-established constitutional principles. In reality, however, Respondent would take this Court on a sojourn into uncharted constitutional waters. In numerous respects, Respondent asks the Court to expand the associational rights of political parties beyond that which this Court has previously recognized and beyond that which is justified under the First Amendment. Justice Stewart's characterization of a dissenting justice's argument for an Equal Protection Clause entitlement to proportional representation is equally applicable here: "Whatever appeal the [Respondent's] view may have as a matter of political theory, it is not the law." *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion).

A. Respondent Seeks To Expand The Right Of A Party To Select A Candidate Beyond Existing Bounds.

Respondent urges the Court to go beyond its prior rulings to hold that Respondent's associational rights are significantly burdened by Minnesota's ballot fusion ban, even though no candidate is precluded from appearing on the ballot, even though party members can endorse, support, campaign for, and vote for the candidate of their choice, and even though the party is permitted to appear on the ballot with "any candidate that the party can

convince to be *its* candidate." *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) (emphasis in original). The only limitation on Respondent's activity is that it cannot appear on the ballot if it selects a candidate who has chosen to run for another party. This Court has never struck down a statute with such minimal impact. Nothing in this Court's First Amendment jurisprudence suggests, much less necessitates, the expansion of a party's associational rights that would be necessary here to strike down the ballot fusion ban.

Specifically, Respondent asks the Court to expand beyond its prior decisions by holding that the interest in party autonomy protected under the right to association includes an apparently unfettered right not only to endorse, support, and vote for the candidate of choice, but to put that candidate on the ballot as the party's candidate even if he is already on the ballot as the candidate of another party. Petitioners demonstrated in their initial brief at 21-24 that the Court's references to the right of a party to nominate the candidate of its choosing in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), do not establish a right of the breadth that Respondent claims.

Respondent seeks further expansion of recognized party rights in arguing that it is not enough to be able to place *some* candidate on the ballot. Rather, Respondent contends that a party and its members have a right to

place on the ballot the *specific* candidate of their choice. Resp. Br. 22.[1]

Respondent's argument ignores the distinction this Court has recognized between regulations that preclude supporters from associating with and voting for a particular candidate and regulations that preclude certain political groups from placing any candidate on the ballot. As the Court explained in *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

> [A]lthough candidate eligibility requirements may exclude particular candidates, it remains possible that an eligible candidate will "adequately reflect the perspective of those who might have voted for a candidate who has been excluded." [L. Tribe, *American Constitutional Law*] at 774 n.2. But courts quite properly have "more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot." *Id.* at 774.

Anderson, 460 U.S. at 793 n.15. The same distinction, between laws that foreclose ballot access to all candidates a class of voters might support and those that keep only particular candidates off the ballot, was relied on by the Court in distinguishing the burden in *Anderson* from that created by the disaffiliation provision in *Storer v. Brown*, 415 U.S. 724 (1974). *Anderson*, 460 U.S. at 791 n.12 (quoted in Pet. Br. 39-40). Thus, the Court has not viewed a

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[1] Respondent erroneously argues that *Norman v. Reed*, 502 U.S. 279 (1992), requires the conclusion that the ability to nominate *some* candidate is not enough to satisfy its associational rights. Resp. Br. 22. The fallacy of this argument was addressed in Petitioners' Brief at 31 n.15.

political party's right of association as encompassing the right to place on the ballot any candidate of its choosing.

The ballot fusion ban is not the type of law described in the preceeding *Anderson* quotation that must be "more carefully appraised." In *Anderson* the Court struck down an early filing deadline law because it precluded a class of independent-minded voters from placing *any* candidate on the ballot. *Anderson,* 460 U.S. at 792-93. In contrast, Minnesota's ballot fusion ban only prevented Respondent from placing a *particular* candidate on the ballot, because he had already chosen to be the candidate of another party.

In this respect, the ballot fusion law is similar to a candidate eligibility statute. The fusion ban merely makes an individual ineligible to become the candidate of one party if she is already a candidate of another party. As the Court explained in *Anderson,* despite the exclusion of a particular candidate, "it remains possible that an eligible candidate will 'adequately reflect the perspective of those who might have voted for a candidate who has been excluded.' " Of course, the fusion ban is less restrictive than a typical candidate eligibility requirement because it does not keep any candidate off the ballot altogether.

Significantly, in candidate eligibility cases this Court has refused to recognize candidacy as a fundamental right. *Clements v. Fashing,* 457 U.S. 957, 963 (1982) (plurality opinion); *id.* at 978 n.2 (Brennan, J., dissenting) (noting "we have never defined candidacy as a fundamental right . . . . "); *Bullock v. Carter,* 405 U.S. 134, 142-43 (1972). It necessarily follows that a political party does not have the correlative right to place any candidate it chooses on the ballot.

Respondent would no doubt disagree and argue, as it has in trying to distinguish *Storer,* Resp. Br. 46-48, that its rights as a political party are greater and more "fundamental" than the rights of a candidate. However, the two cannot properly be separated in this context:

> So long as the ideas in which a potential candidate and other party members believe can be represented by another candidate, the primary purpose of political association has been served. A candidate may, of course, prefer to be the party nominee, but *judicial cognizance of that interest as an element of associational rights would be merely a backdoor way of establishing a right to candidacy.* . . . [S]o long as not all potential candidates espousing a specific viewpoint not inconsistent with declared party ideology are excluded, the political ideas of party members can be represented by other candidates. As a result, the ability of individuals to advance ideas through group association will not have been impaired.

Note, *Developments in the Law – Elections,* 88 Harv. L. Rev. 1111, 1176-77 (1975) (emphasis added; footnote omitted). The same reasoning is evident in Professor Tribe's explanation why the plurality's holding in *Clements* that candidacy is not a fundamental right is "entirely defensible:"

> [A]lthough groups of voters have a First Amendment-based right to associate so as to advance a candidate to represent their views, these associational rights do not seem to require that any *particular* individual serve as that candidate.

Laurence H. Tribe, *American Constitutional Law* 1098 n.5 (2d ed. 1988) (emphasis in original). It is precisely that

"First Amendment-based right to associate as to advance a candidate to represent their views" that Respondent must rely on here. Petitioners agree with Professor Tribe that that right does not extend, and should not be extended, to the selection of a particular candidate.

B. Respondent Seeks A New First Amendment Right To Use The Ballot As A Medium Of Political Expression.

Another example of Respondent's attempt to expand the scope of political party rights in the electoral context is its argument that it has a First Amendment right to use the ballot as a means of expressing to candidates and voters the strength of the party. It is because of this inability to demonstrate its strength through the State's counting of votes that Respondent claims the ballot fusion ban prevents third parties from gaining and maintaining popular support. Resp. Br. 8-9. This concept of using the ballot to send a message is also the basis for Respondent's argument that there is a constitutional right to a separate ballot line for each party even if they share a fusion candidate. Resp. Br. 26-28.

Noticeably absent from Respondent's argument is citation to any decision of this Court recognizing First Amendment protection for the expressive functions of the ballot Respondent advocates. To the contrary, as discussed in Pet. Br. 32-33, in *Burdick v. Takushi*, 504 U.S. 428 (1992), both the majority and the dissent firmly and unequivocally rejected the concept that the First Amendment guarantees a right to use the ballot for expressive purposes. As Justice Kennedy pointed out, "the purpose of casting, counting, and recording votes is to elect public

officials, not to serve as a general forum for political expression." *Id.* at 445 (Kennedy, J., dissenting).

Respondent and its amici attempt to minimize this rejection of the "ballot-as-political-expression" theory by suggesting that the Court in *Burdick* only rejected the right of one write-in voter to cast a protest vote for Donald Duck. Resp. Br. 27-28. *Burdick*'s significance is not so limited. While at its extreme a right of political expression through the ballot would protect even a protest vote for Donald Duck, the complete ban on write-in voting at issue in *Burdick* had much broader impact, but was nevertheless upheld. Moreover, Respondent's implicit suggestion that supporters of minor political parties enjoy a right to express themselves through the ballot while independent voters or those who wish to cast protest votes do not, invites a form of content and viewpoint-based discrimination that the First Amendment will not tolerate.[2]

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[2] A further reason to reject Respondent's attempt to expand the function of the ballot beyond election of public officials is demonstrated by historical perspective. As this Court has explained:

> During the Colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. . . .
>
> Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system.

Burson v. Freeman, 504 U.S. 191, 200 (1992). Thus, at the time the Bill of Rights was adopted, paper ballots were a rarity. It is hardly plausible that the Framers were concerned in adopting the First Amendment about protecting expressive content (beyond who was being voted for) of raising one's hand or shouting yea or nay.

Respondent's novel suggestion that the expressive content of casting a ballot is entitled to First Amendment protection should be rejected.

C. Respondent Would Expand The Concept Of Disproportionate Impact On Minor Parties.

Another refrain in Respondent's Brief is that Minnesota's ballot fusion ban must fall because it is not neutral. There is no dispute that this Court has held that "a burden that falls unequally on new or small political parties or on independent candidates impinges . . . on associational choices protected by the First Amendment." *Anderson*, 460 U.S. at 793. In arguing that the fusion ban has a disproportionate negative impact on minor parties, Respondent would extend this principle beyond the reach of the cases this Court has decided.

1. Right to a system that maximizes minor party opportunity for growth.

Respondent's disproportionate impact argument is premised on the greater need of minor parties to engage in ballot fusion. Resp. Br. 18. In order to gain and maintain popular support, Respondent argues, minor parties must be able to demonstrate strength at the polls and provide their supporters with candidates who have a chance of winning. They can do this only if they are able to place popular candidates of major parties on the ballot as their own, according to Respondent.

This disproportionate impact argument is ultimately grounded on the notion, embraced by the Eighth Circuit in this case, that minor parties have a right to an electoral

system that maximizes their ability to grow and thrive. Pet. App. 5-6. Since minor parties inherently have a greater need to attract new supporters than do major parties, any aspect of the electoral system that does not facilitate minor party growth, such as a winner-takes-all system, can be said to impose a disproportionate burden on minor parties in the same way as does the ballot fusion ban. As demonstrated in Petitioners' Brief at 25-35, neither this Court's decisions nor constitutional principles support the creation of such a right.

It is important to distinguish the nature of the burden on minor parties that Respondent argues must be alleviated by invalidation of the ballot fusion ban from the types of burdens that have required invalidation of election regulations in the Court's prior cases. The Court has struck down laws that discriminated against minor parties by excluding them from the ballot, *Anderson*, 460 U.S. at 792-94,[3] or prevented them from growing even if they were to attain widespread support, *see Norman*, 502 U.S. at 705-06 (see Pet. Br. 29-31). Respondent asserts a different and more expansive right. Respondent argues for a right to a system that not only recognizes and honors the popular support of the minor party, but a system that makes it easier for a party to obtain and retain popular support. While a system that encourages such growth may be laudable and desirable from the perspective of a political scientist, there is nothing in the jurisprudence of this Court or the First Amendment that makes such a system a right.

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[3] *Anderson* specifically involved rights of independent voters, but the Court made it clear that its rationale was applicable to similar burdens on minor parties. *Id.* at 793.

Furthermore, the cases cited by Respondent do not support its broad concept of impermissible disproportionate impact. In *Anderson*, the Court struck down Ohio's filing deadline of mid-March for independent presidential candidates in large part because of the disadvantage it placed upon supporters of independent candidates compared to the major parties, who would not adopt their nominees and platforms for another five months. 460 U.S. at 790-91. Respondent also relies on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), and the potential exemption recognized in those cases for minor parties from disclosure requirements upheld as to major parties. Those rulings are irrelevant. The rationale for allowing the exemption did not turn on the right of minor parties to a system that facilitates their growth. Rather, it was based on the recognition that for some unpopular minor parties the compelled disclosure of contributors names could subject them to "threats, harassment or reprisals . . . . " *Buckley*, 424 U.S. at 74. This was merely an application in the campaign regulation area of an established aspect of the right of association. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958) (compelled disclosure can unconstitutionally chill right of association). These cases contribute no support to Respondent's expansive disproportionate impact theory.[4]

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[4] Contrary to Respondent's implication, the Court in *Buckley* expressly *rejected* a request for a blanket exemption for minor parties. Instead, the Court held that an exemption should be granted on a case by case basis and only if a particular party could prove that it needed the protection of an exemption. *Buckley*, 424 U.S. at 72-74. That is what occurred in *Brown*.

2. Right to a voting cue on the ballot.

Respondent also contends that it is treated on an unequal basis by the ballot fusion ban because the State permits a major party to be identified with its candidate on the ballot but denies that right to the Respondent if it chooses to nominate the same candidate. Respondent even suggests that the law engages in censorship because some parties are allowed on the ballot and others are not. Resp. Br. 25. The flaw in this argument is that the State does not discriminate against any party or type of party regarding which party name appears on the ballot with a candidate. This is not a situation in which the State has declared that only major parties can be identified on the ballot, as in *Dart v. Brown*, 717 F.2d 1491 (5th Cir. 1983) (upholding state law that allowed party designation on ballot only for political parties that had demonstrated support of 5% of the state's voters), *cert. denied sub nom. Libertarian Party v. Brown*, 459 U.S. 825 (1984). On the contrary, the ballot fusion law plays no part in determining which party name appears on the ballot; that is a matter of the candidate's choice.

The ballot fusion ban, in practical terms, allows each candidate one party designation on the ballot. If multiple parties nominate a candidate, the candidate, not the State, chooses which party name appears on the ballot. Unlike the discrimination against minor parties condemned by this Court, where "a restriction . . . limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," *Anderson*, 460 U.S. at 793, the ballot

fusion ban merely requires a candidate to choose the one party designation that will appear by his name.[5]

D. Respondent Proposes A New Right To A Separate Voting Line.

Respondent argues that not only must fusion be permitted, but that it has a further constitutional right to a separate ballot line for its fusion candidates. Resp. Br. 26-30. The Court should not reach this claim. It is the Court's policy to avoid unnecessary adjudication of constitutional issues. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995). Respondent concedes that it is not necessary to decide whether a separate voting line for each fusion party is constitutionally required. Resp. Br. 12. Petitioners agree that such adjudication is unnecessary. Therefore, the Court should refrain from deciding the issue.

If the Court chooses to address the separate voting line issue, it should reject this additional expansion of political party rights and hold that a separate voting line for each party is not required even if multiple-party candidacies must be permitted. There is no evidence that any disproportionate harm attributable to fusion bans cannot be cured by combined voting lines for major and minor parties nominating the same candidate. A combined voting line removes significant objections raised by

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[5] In any event, the legitimacy of Respondent's concern about the need for a voter cue on the ballot is undermined by the fact that Respondent, like all other parties, is free to communicate its candidate preferences in various ways, including the distribution of written material that voters may refer to while casting a ballot.

Respondent to Minnesota's fusion ban. It permits the minor party not only to nominate the candidate of its choice, but also to appear on the ballot with that candidate.

Respondent contends that a separate voting line is constitutionally mandated because it communicates "indispensable information" from voters to candidates and others because "[i]t tells them what the people want them to do." Resp. Br. 27. Additionally, Respondent argues that separate voting lines for minor parties using fusion allows them "to demonstrate the dimensions of their strength in the general electorate." Resp. Br. 28. Thus, the right to a separate voting line is grounded in Respondent's theories of a right to use the ballot as a mode of political expression and the related right to an electoral system that maximizes the opportunity for minor parties to gain new converts. As demonstrated above and in Petitioners' Brief, those theories have no basis in this Court's decisions or in constitutional principle. Accordingly, the right to a separate voting line should not be created.

II. THE STATE'S JUSTIFICATIONS FOR THE FUSION BAN SATISFY THE *ANDERSON* TEST.

It is worth reiterating that unless a burden on associational rights is severe, the Court has not applied strict scrutiny that requires demonstration of a compelling state interest and narrow tailoring. *Burdick*, 504 U.S. at 434. As demonstrated above and in Petitioners' Brief, the burden on Respondent's associational rights is minimal, at worst. The interests articulated in Petitioners' Brief are sufficient

to justify that burden. Those arguments will not be reiterated here. Several responsive comments are warranted, however.

First, Respondent argues that Petitioners have not sufficiently demonstrated that the problems the ballot fusion ban is intended to prevent would actually occur if the ban were removed. Resp. Br. 35. However, as pointed out in Petitioners' Brief, a state is not generally required to present empirical evidence of harmful effects where, as here, the regulation that allegedly burdens First Amendment rights is intended to protect the act of voting itself. Pet. Br. 41-42, citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). *See also Burson v. Freeman*, 504 U.S. 191, 209 n.11 (1992). Respondent argues that the modified burden of proof used in *Munro* and *Burson* is not applicable here. Resp. Br. 35 n.32. However, the cases cited by Respondent requiring a more empirical showing by the state are not from the electoral context and are, therefore, inapposite.[6]

Additionally, in *Burson* the Court recognized the difficulty of the state demonstrating on an empirical basis the disruption of voting that it sought to preclude because bans on campaigning near polling places had been in effect in all states for many years. Similarly, ballot

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[6] *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), concerned a ban on acceptance of honoraria by federal employees; *Edenfield v. Fane*, 507 U.S. 761 (1992), dealt with a state ban on solicitation by certified public accountants; and *Colorado Republican Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996) addressed campaign finance laws. Thus, none involved regulation intended to preserve the integrity of the voting process itself.

fusion has been banned in all but a handful of states for almost a century and has been practiced on an ongoing basis in only one of those handful of states that permit it. Accordingly, there is a very limited base of experience from which empirical evidence could be derived.

Moreover, numerous courts have acknowledged the legitimacy of the concern that fusion ballots can cause voter confusion. Thus, in Minnesota, "the confusion of double designation" did not escape judicial notice. *In re Day*, 102 N.W. 209, 212 (Minn. 1904) (Cant, Spec. J., dissenting).[7] Likewise, the Wisconsin Supreme Court, in upholding the constitutionality of that state's fusion ban, held:

> The confusion and uncertainty that would arise in such a case from the double printing of names, furnishes a strong reason for prohibiting it, and that, with the other reasons mentioned, strongly support the wisdom of the prohibition as a proper legislative regulation.

State ex rel. Runge v. Anderson, 76 N.W. 482, 487 (Wis. 1898).[8]

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[7] The *Day* majority held Minnesota's 1901 ballot fusion ban to be unconstitutional on the ground that the title of the enacting bill did not properly reflect its content. *Day*, 102 N.W. at 211. The ballot fusion ban was reenacted in 1905. 1905 Minn. Rev. Laws, ch. 6, § 176, at 31.

[8] Respondent's portrayal of the enactment of fusion bans around the turn of the century as exclusively or largely driven by animus toward competitive third parties, Resp. Br. 5-10, ignores this contemporaneous judicial recognition of the pitfalls of voter confusion generated by multiple-party candidacies. Moreover, Respondent's argument is based on statements of legislators in other states and generalizations by political

More recently, the Pennsylvania Supreme Court noted that avoiding voter confusion is "precisely the object" of an election code provision prohibiting a political party from nominating an already-nominated candidate for the same office. *In re Street*, 451 A.2d 427, 430 (Pa. 1982). The legitimacy of the state's concern with voter confusion caused by fusion was illustrated in *In re Election of the United States Representative For the Second Congressional District*, 653 A.2d 79 (Conn. 1994). There, the Connecticut Supreme Court rejected a recount petition while noting that the state's ballot fusion had resulted in voter confusion. Thus, the court observed:

> For example, in this election, the name of Joseph Lieberman, a candidate for office of United States Senator, appeared on one line of the ballot as the nominee of A Connecticut Party (ACP) and on another line of the ballot as the nominee of the Democratic Party. This dual listing can lead some voters to mark the names of their preferred candidates at each place where that name appears. Such ballots, crowded with multiple markings for particular candidates, may be difficult for some voters to verify. Voters may be confused because they have mistakenly marked not just their preferred candidate's name as it is listed by two different political parties, but may also have inadvertently marked the names of two different individuals who are candidates for the same office.

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historians. No evidence is presented regarding the 1981 enactment of the Minnesota statute actually at issue here. Although Minnesota initially enacted a fusion ban in 1901, a revised election code, including the fusion ban at issue in this case, was enacted in 1981. Act of April 14, 1981, ch. 29, art. 4, sec. 6, 1981 Minn. Laws 73. General historical animus, even if proven, cannot properly be attributed to later-enacted specific legislation. *See City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion).

Id. at 112-13. Thus, however many turn-of-the-century state legislators may arguably have been motivated by a desire to limit minor party influence in voting for fusion bans, there were (and are) also legitimate ends served, including minimizing voter confusion.

Finally, Petitioners explained the concern about fusion leading to confusing "laundry list" ballots, with many single issue groups appearing as minor parties solely for the purpose of sending a message to the candidate and other minor parties appearing as the candidate's means of signaling his specific platform issues on the ballot. Pet. Br. 42-43. Respondent countered that these concerns can be dealt with by less restrictive means, specifically, by increasing ballot access requirements to make it harder for minor parties to get on the ballot. Resp. Br. 37-38. This alternative would be contrary to Minnesota's policy of allowing easy access to the ballot to encourage diversity of candidates. *See* Minn. Stat. § 204B.08 (1994) (2,000 or fewer signatures required for nominating petitions for various offices). Moreover, the ultimate impact of Respondent's suggestion is that Minnesota should make it more difficult for third parties that want to nominate their own candidate to get on the ballot so that parties who want to nominate someone else's candidate on the ballot can do so. The First Amendment should not be construed to compel that course of action.

III. RESPONDENT'S EVIDENCE OF THE BENEFITS OF FUSION AND THE REASONS FOR THE DECLINE OF THIRD PARTIES IS OPEN TO DEBATE.

Respondent exaggerates the salutary effects of fusion in two respects. First, the evidence of effective use of fusion by minor parties is based primarily on a narrow band of time in the late 19th century, even though fusion was available for a far longer period. Second, experience in recent decades shows a strong minor party presence, which Respondent asserts will result from allowing fusion candidacies, only in one of the seven states that permit fusion. See Pet. Br. 27-28. These are slender reeds on which to support the conclusion that allowing ballot fusion will allow minor parties to thrive and endure as significant players in electoral politics.

Furthermore, Respondent's attempt to illustrate the benefits of fusion by pointing to New York, where fusion is said to "support[ ] a lively minor party tradition" marked by third parties "providing the margin of victory for prominent candidates," Resp. Br. 5-6, presents only part of the picture. Some see a darker side to fusion that infects the entire New York electoral system. Thus, one scholar has concluded:

> [T]he disadvantages of the [New York fusion] system seem clearly to outweigh any possible advantages. . . . [T]he system allows minor parties to wield influence far in excess of their electoral strength . . . [, has] given way to obsession with patronage . . . [and] deprived New Yorkers of . . . a wide variety of candidate choices on election day . . . .

Howard A. Scarrow, *Parties, Elections, and Representation in the State of New York* 73 (1983). *See also New York's Upcoming Non-Elections*, N.Y. Times, September 15, 1996, at A14 (nat'l ed.) (editorial criticism of "nonaggression pacts" between major parties and arguing that major-party cross-endorsements of incumbent candidates absolve them of accountability).

On the other side of the coin, Respondent's conclusion that fusion bans effectively kept the majority party in power and were responsible for the decline of effective third party activity, is also subject to question. For example, Respondent asserts that in Minnesota Republicans won the 15 gubernatorial elections after fusion was banned by the Republican-controlled legislature in 1901. Resp. Br. 8 n.8. On the contrary, non-Republicans won one-third of those 15 races – in 1904, 1906, 1908, 1914 and 1930. *Minnesota Legislative Manual* 173 (1995-96).

Likewise, Respondent's effort to paint in darkest tones the supposed historic adverse effects of fusion bans on third parties is unbalanced at best. As one of the amici professors has written, fusion itself "sometimes helped destroy individual third parties . . . . " Peter H. Argersinger, " 'A Place on the Ballot': Fusion Politics and Anti-fusion Laws," in *Structure, Process, and Party: Essays in American Political History* 151 (1992). The view advanced by the amici professors – that fusion bans helped destroy third parties and reduce voter participation, Amici Prof. Br. 7-12 – is at least debatable. The negligible impact of fusion bans on third-party voting is reflected in its absence from a recent study of factors that inhibit third-party presidential voting. Steven J. Rosenstone, et al., *Third Parties in America: Citizen Response to Major Party Failure* 19-25 (1984). *See also Williams v. Rhodes*, 393 U.S.

23, 60 (1968) (Stewart, J., dissenting) (attributing two-party system to confluence of social/political forces rather than consequence of legal restrictions on minor parties). Furthermore, the notion that fusion bans somehow reduce voter participation, even if relevant to the constitutional analysis, is not reflected in recent election data. Voter turnout is significantly higher in Minnesota, where fusion is banned, than in New York, where fusion is most widely practiced. U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1995*, Table No. 462 at 291 (showing Minnesota voting rate 18-28 percentage points higher than New York voting rate between 1988 and 1994).

CONCLUSION

For the foregoing reasons and the reasons presented in Petitioners' Brief, the judgment of the court of appeals should be reversed.

Dated: October, 1996

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

PETER M. ACKERBERG
Assistant Attorney General

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2128
(612) 282-5712

Counsel for Petitioners

No. 95-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LOU McKENNA, *et al.*,

Petitioners,

—v.—

TWIN CITIES AREA NEW PARTY,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, MINNESOTA CIVIL LIBERTIES UNION, THE BRENNAN CENTER FOR JUSTICE, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENT

Burt Neuborne
(*Counsel of Record*)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Elliot M. Mincberg
Lawrence S. Ottinger
People For the American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights and this nation's civil rights laws. The ACLU of Minnesota is one of its statewide affiliates.

The right to participate fully in the nation's political processes is central to the constitutional scheme. The ACLU has, therefore, appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, on behalf of voters, candidates and political parties that have been effectively disenfranchised by unduly cumbersome or unduly restrictive electoral laws. This case raises those issues anew. Its proper resolution is thus of critical importance to the ACLU and its members around the country, many of whom live in states that have statutes similar to the Minnesota law being challenged in this case.

The Brennan Center for Justice is a partnership, designed to honor Justice William Brennan, Jr., between law clerks who served Justice Brennan during his thirty-four years as an Associate Justice of the United States Supreme Court, and the faculty of New York University School of Law. Before giving his blessing to the enterprise, Justice Brennan extracted a promise that the Brennan Center would function as a genuinely independent center of thought on significant legal issues affecting American life. He particularly insisted that no special deference be paid to his views, or to his opinions. Justice Brennan played no role in the formulation of this brief, or in the decision to file a brief in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. In keeping with Justice Brennan's legendary contributions to the law of American democracy, the Center has chosen to concentrate initially on a Democracy Project.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of pluralism, liberty, and participatory democracy, People For now has over 300,000 members nationwide.

People For has frequently represented parties and filed *amicus curiae* briefs before this Court in important First Amendment and civil rights litigation. People For has joined in filing this *amicus* brief to help vindicate the important constitutional principles at stake in this case, particularly the right of citizens to associate and to participate fully and effectively in the democratic political process.

Amici submit this brief in the hope that it will prove useful to the Court in considering the difficult First Amendment issues raised by attempts to regulate efforts by third parties to play a vigorous role in the democratic process.

STATEMENT OF THE CASE

Since 1901, Minnesota has prohibited "fusion candidacies," in which a candidate appears on the ballot as the nominee of more than one political party. Under Minnesota law, if a candidate has accepted the nomination of one political

party, the candidate may not appear as the standard bearer of another party on the ballot, even where, as here, the candidate and both parties attempt to forge the electoral alliance. *See* Minn. Stat. §204B.04, subd. 2; and §204B.06, subd. 1(b).

In this case, Rep. Andy Dawkins accepted the nomination of the Minnesota Democratic-Farmer-Labor Party (DFL), the Minnesota affiliate of the national Democratic Party, in connection with the 1994 elections to the Minnesota House of Representatives. He was also duly selected as the nominee of the New Party, a recently formed political party that had qualified for a place on the Minnesota ballot by demonstrating the required modicum of popular support. Minn. Stat. §204B.08, subd. 3(c). When the New Party attempted to designate Rep. Dawkins as its standard bearer, the designation was rejected by Minnesota officials because Dawkins was also the designee of the DFL. No objection to the New Party's effort to designate Dawkins as its candidate was lodged by Dawkins, or by the DFL.[2]

The district court upheld the absolute ban on fusion candidates, reasoning that the ban was a permissible device to prevent voter confusion, and to assure a clear winner. 863 F.Supp. 988 (D.Minn. 1994). The Eighth Circuit reversed, holding that an absolute ban on fusion candidacies violates the associational rights of adherents of the New Party. 73 F.3d 196 (8th Cir. 1996). This Court granted *certiorari* to resolve a conflict between the Eighth Circuit decision, and an earlier split-decision of the Seventh Circuit upholding a similar effort by Wisconsin to ban fusion candida-

[2] Minnesota argues that the DFL's failure to object to the nomination of its candidate by the New Party in 1994 should not be taken as consent. But the knowing failure to interpose an objection cannot be viewed in any other way. Significantly, the DFL has never appeared in this litigation to assert a contrary position.

cies. *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The body of the Constitution sets forth a sophisticated blueprint for complex democratic governance. The text is, however, virtually silent about how to elect the government.[3] The critical task of defining, and preserving, the right to participate in democratic politics has fallen to the amendment process, and to this Court.

No fewer than twelve constitutional amendments describe the constitutional prerequisites for a vigorous, self-governing republic of political equals. The structure of the First Amendment mirrors the life cycle of a democratic idea, uniting for the first time in a single document the substantive preconditions for a democratic polity -- freedom of thought, freedom of speech and press, freedom of assembly and association, and freedom to petition for redress of grievances. The Fourteenth Amendment assures membership in the democratic polity, guaranteeing state citizenship and

[3] Except for setting forth age, citizenship, and residence requirements for candidates, the body of the Constitution provides almost no substantive guidance concerning democratic ground rules. Article I, Section 2, provides that "electors" of the House of Representatives shall have the same qualifications as "electors" for the most numerous house of the state legislature. Article I, Section 4, leaves the time, place, and manner of congressional elections to the states, unless Congress acts. Article II, Section 1, leaves to the states the mechanism for choosing presidential electors. Article IV, Section 4, guarantees each state a "Republican form of government" but, since *Luther v. Borden*, 48 U.S. 1 (1849), the clause has been treated as judicially unenforceable. Finally, Article VI provides that no religious test may be used for office or any public trust.

equal protection of the laws to all "persons." Indeed, of the seventeen amendments since the adoption of the Bill of Rights, eleven have dealt with democratic governance.[4] If one excludes the two Prohibition amendments, since 1791 the only amendments that have not dealt with implementing democratic ideals have been the Eleventh (reinstating state sovereign immunity); the Thirteenth (abolishing slavery); the Sixteenth (authorizing the income tax); and the Twenty-seventh (regulating congressional compensation). Moreover, the arc of the twelve "democracy" amendments could not be clearer -- a steady expansion of constitutional protection of the right to vote, the right to run for office, and the right to associate freely for the advancement of political ideals.

A similar dynamic underlies the democracy decisions of this Court. After an uncertain beginning caused, in part, by the lack of an explicit provision protecting democracy in the text of the original Constitution itself,[5] the Court has recognized that an amalgam of constitutional amendments, an-

[4] In addition to the First and Fourteenth Amendments, the Twelfth Amendment provides for the separate election of the President and Vice President, in the wake of the 1800 Electoral College tie between Thomas Jefferson and Aaron Burr. The Fifteenth Amendment bans racial discrimination in access to the ballot. The Seventeenth Amendment provides for democratic election of the Senate. The Nineteenth Amendment extends the vote to women. The Twentieth Amendment eliminates the undemocratic "lame duck" Congress. The Twenty-second Amendment establishes a two-term limit for the Presidency, as a safeguard against undue concentration of power. The Twenty-third Amendment extends the vote in presidential elections to the residents of the District of Columbia. The Twenty-fourth Amendment abolishes the poll tax. The Twenty-fifth Amendment provides a temporary, democratically acceptable, solution for Presidential incapacity. The Twenty-sixth Amendment extends the vote to 18-year olds.

[5] *E.g.*, *Giles v. Harris*, 189 U.S. 475 (1903); *Pope v. Williams*, 193 U.S. 621 (1904); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Breedlove v. Suttles*, 302 U.S. 277 (1937).

chored in the First and Fourteenth, provide powerful support for five formidable lines of precedent that converge in this case to hold Minnesota's absolute ban on fusion candidacies unconstitutional.

First, the Court has provided effective protection for the right to vote. Beginning with decisions defending the right to vote against both overt and sophisticated racial discrimination,[6] the Court has carefully mapped the substantive contours of the right to cast an equal, and effective, ballot.[7] Most recently, in *Burdick v. Takushi*, 505 U.S. 428 (1992), the Court rejected attempts to analogize voting to a pure act of self-expression.[8] Instead, the Court insisted on treating voting as a genuine exercise of power, enabling an individual to register a binding preference for a candidate, and to instruct the successful candidate about how to carry out the governmental function. Minnesota's absolute refusal to permit fusion candidacies impinges directly on the *Burdick* Court's insistence that voting be equated with a genuine exercise of political power.

Second, recognizing that organized political parties are integral to the exercise of political power, the Court has both protected the right to form new political parties,[9] and has required that a political party wishing to participate formally in the electoral process demonstrate a minimum modicum of popular support.[10] Under the Court's precedents, just as the *Burdick* Court equated the act of voting with an exercise of power, a political party seeking formal access to the ballot must do more than merely express an idea; it must demonstrate a minimal capacity to perform as the vehicle for the exercise of political power. Minnesota's absolute refusal to permit fusion candidacies severely restricts the ability of new political parties to develop such a power base, relegating third parties to marginal vehicles for the expression of protest.

Third, recognizing that formal political parties are vessels of power, the Court has sought to protect the integrity and internal stability of political parties from internal implosion and external subversion.[11] Minnesota's absolute ban on fusion candidacies goes far beyond the protective devices approved by this Court, since it applies even when both par-

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[6] *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn v. United States*, 238 U.S. 347 (1915); *United States v. Mosley*, 238 U.S. 3477 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Lane v. Wilson*, 307 U.S. 268 (1939); *United States v. Classic*, 313 U.S. 299 (1941); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

[7] *E.g., Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Evans v. Cornman*, 398 U.S. 419 (1970); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Dunn v. Blumstein*, 405 U.S. 330 (1972). *But see Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

[8] In *Burdick*, the Court rejected a challenge to Hawaii's refusal to permit write-in ballots in certain elections. The Court rejected the notion that write-in voting was required to permit a voter to express opposition to proposed candidates. The Court held that voting was an exercise of power, not merely an expression of views.

[9] *E.g., Norman v. Reed*, 502 U.S. 279 (1992); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *American Party of Texas v. White*, 415 U.S. 767 (1974). *See generally NAACP v. Alabama*, 357 U.S. 449 (1958)(protecting the right to political association under the First Amendment).

[10] *Jenness v. Fortson*, 403 U.S. 431 (1971); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

[11] *E.g., Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Storer v. Brown*, 415 U.S. 724 (1974).

ties, and the candidate, wish to mount a fusion candidacy.

Fourth, the Court has understood that a political party, as an organization dedicated to affecting the allocation of political power, must enjoy substantial autonomy to carry out a strategic agenda for action.[12] Minnesota's absolute ban on fusion candidacies places obvious roadblocks to the strategic autonomy of both major and minor parties. Major parties cannot accept the ballot support of defined aspects of the electorate needed to enhance the potential for victory. Third parties cannot forge formal electoral alliances designed to open the road to power.

Fifth, when the legislature has imposed rules that act to insulate the major political parties from effective political competition, this Court has attempted to protect the market in political power from unfair restraints on free political trade.[13] Minnesota's absolute ban on fusion candidacies is a classic technique to prevent third parties from evolving into genuine competitors for power.

Thus, viewed from the perspective of a voter wishing to support a fusion candidate; a major party wishing to expand its electoral base; a minor party wishing to forge an electoral alliance; or a candidate wishing to embrace an additional constituency, an absolute ban on fusion candidacies cannot withstand constitutional scrutiny.

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[12] *E.g., Colorado Republican Campaign Committee v. FEC*, __ U.S. __, 64 U.S.L.W. 4663 (June 26, 1996); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Democratic Party v. Wisconsin ex. rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).

[13] *E.g., Williams v. Rhodes*, 393 U.S. 23 (1968); *American Party of Texas v. White*, 415 U.S. 767; *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

ARGUMENT

WHEN, AS HERE, ALL INTERESTED PARTICIPANTS WISH TO SUPPORT A FUSION CANDIDACY, MINNESOTA'S ABSOLUTE BAN VIOLATES: (A) A THIRD-PARTY VOTER'S RIGHT TO CAST AN EFFECTIVE BALLOT; (B) A THIRD-PARTY'S RIGHT TO CHOOSE ITS CANDIDATE; (C) THE RIGHT OF MAJOR AND MINOR PARTIES TO EXPAND THEIR ELECTORAL BASES; AND, (D) A CANDIDATE'S RIGHT TO EMBRACE A NEW CONSTITUENCY

The usual effort to mount a fusion candidacy involves four participants: the candidate, a major party, a third party, and voters wishing to support the fusion candidate on a third-party line. A negative response to fusion by any of the participants dooms the enterprise.

The putative fusion candidate may decline to be the nominee of more than one party or, indeed, of any party at all. The third party may choose another nominee. Voters belonging to either or both parties may decline to support the fusion candidate at the polls or, even, refuse to place the fusion candidate on the ballot. Finally, while the refusal of a major party to permit its willing nominee to be the candidate of another party would raise complex constitutional issues, it is likely that the opposition of the major party would, as a practical matter, preclude an "involuntary" fusion candidacy. Thus, as here, the fusion process will almost always involve a concerted effort by all four participants to achieve a shared political goal. The stark issue raised by this appeal is whether Minnesota can override the cumulative First Amendment interests of all four participants by imposing an absolute ban on fusion candidacies. Viewed from the perspective of any of the participants, an absolute ban is unconstitutional. Measured against the cumulative

weight of the participants' First Amendment interests, an absolute ban must be struck down.

A. An Absolute Ban On Fusion Candidacies Violates The Right To Vote

In *Wesberry v. Sanders*, 376 U.S. at 17, this Court recognized the primacy of the right to vote:

> No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Accordingly, the Court has developed a formidable body of precedent protecting an individual's right to cast an equal, effective ballot. In case after case, the Court has recognized that the essence of the right to vote is power, not symbolism. *E.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(invalidating racial gerrymander); *Baker v. Carr*, 369 U.S. 186 (requiring mathematical equality of voting power); *Carrington v. Rash*, 380 U.S. 89 (guaranteeing vote to *bona fide* residents); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (invalidating poll tax); *Kramer v. Union Free School District*, 395 U.S. 621 (guaranteeing vote to affected residents); *Cipriano v. City of Houma*, 395 U.S. 701 (same); *Evans v. Cornman*, 398 U.S. 419 (1970)(same); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (same); *Dunn v. Blumstein*, 405 U.S. 330 (invalidating durational residence requirements for voting); *Davis v. Bandemer*, 478 U.S. 109 (1986)(recognizing cause of action for political gerrymander).

Minnesota argues that its prohibition on fusion candidacies only peripherally interferes with the right to vote because third-party voters remain free to cast a ballot for the

putative fusion candidate, albeit as the nominee of another party; alternatively, third-party voters may remain faithful to their party by supporting its own nominee. The only electoral choice denied a third-party voter, Minnesota contends, is the ability to support another party's nominee as the standard bearer of the voter's own party.

Minnesota's understandable effort to minimize its interference with the right to vote is premised on an anemic conception of what it means to cast a ballot. It treats voting as a quixotic act of self-expression, not an exercise of power. In *Burdick v. Takushi*, 505 U.S. 428, however, a majority of this Court rejected an attempt to characterize voting as merely another form of self-expression. Rather, the Court held, voting in a democracy is a unique exercise of power; power to determine the winner, and power to instruct the winner on how to govern.

Unfortunately, instead of respecting the vote as an exercise of real power, Minnesota's ban on fusion candidacies forces putative fusion voters to cast a "symbolic" protest ballot for a third-party candidate who cannot win, or reinforce a major political party whose platform they oppose. Either alternative deprives the voter of one-half of what it means to cast an effective ballot in a democracy

Minnesota's argument overlooks the fact that voting is an exercise of power in two time dimensions: present and future. In the immediate present, voting determines who wins. But, by acting as a public plebescite on the issues, voting also influences how the winner will actually govern. Elections provide mandates as well as jobs. An absolute ban on fusion candidacies requires putative fusion voters to surrender one of the power dimensions of a democratic ballot. Under Minnesota's system, putative fusion voters may insist on the power to help choose the winner by voting for the nominee of a major party. But the price of voting for a candidate with a real chance to win is reinforcing a political

mandate with which fusion voters may strenuously disagree. *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In effect, for a fusion voter, the price of exercising voting power in the present is the surrender of voting power to influence the future.

Conversely, under Minnesota law, putative fusion voters may attempt to influence the future by supporting the "protest" nominee of a third party. But the price of sending a heartfelt message about the future is renunciation of the power to influence the present. Either way, Minnesota deprives putative fusion voters of a critical aspect of ballot power.

B. An Absolute Ban On Fusion Candidacies Violates The Associational Freedom Of Adherents Of A Third Party

This Court has recognized that voting power cannot be exercised effectively in isolation. In order to make a vote count, it is generally necessary to band together with other like-minded persons to advance a particular candidate, or a given position on the issues. Accordingly, the Court has carefully protected the right of citizens to form new political parties. *Norman v. Reed*, 502 U.S. 279 (cannot inhibit statewide growth of new party); *Moore v. Ogilvie*, 394 U.S. 814 (invalidating unfair restrictions on statewide ballot access); *American Party of Texas v. White*, 415 U.S. 767 (invalidating refusal to list minor parties on absentee ballots). *See generally NAACP v. Alabama*, 357 U.S. 449.

As with voting, however, the Court has declined to view formal political parties as mere organs of expression. Rather, the Court has treated political parties as vessels for the transmission of electoral power. Thus, while no restrictions may be imposed on the formation or structure of ordinary political associations, political parties seeking ballot

status may be required to adopt internal governance structures, and may be required to demonstrate a minimum modicum of popular support. *E.g., Marchioro v. Chaney*, 442 U.S. 191 (1979)(upholding requirement of state-wide organization); *Jenness v. Fortson*, 403 U.S. 431 (upholding minimum showing of support for ballot access); *Munro v. Socialist Workers Party*, 479 U.S. 189 (same).

Minnesota argues that its ban on fusion candidacies does not materially burden the right to organize a new political party, since the new party remains free to nominate its own candidate. But, once again, Minnesota confuses symbolism with power. It is true, of course, that adherents of a new political party remain free under Minnesota's scheme to nominate a symbolic protest candidate. But, unless new parties are permitted to make formal electoral alliances by nominating candidates with a real chance to win, the new parties are excluded from power, and relegated to the role of symbolic protest organizations.

In fact, banning fusion candidacies imposes a double-barrelled restriction on the ability of new parties to be anything other than protest movements. First, it denies new parties the freedom to choose the most attractive candidate willing to accept its nomination. If the development of a power base is an important attribute of a political party, walling the party off from a willing candidate with the best perceived capacity to energize the party's potential power base is a devastating liability.

Second, it forces potential adherents of the new party to make the Hobson's choice, described *supra* at 10-12, between expressing a principle and exercising electoral power. A political party that cannot offer its adherents both the opportunity to support a principle, and the ability to participate in the selection process, can never expect to develop a stable power base.

In *American Party v. White*, 415 U.S. 767, the Court struck down a Texas practice that discriminated against small parties by denying them a listing on absentee ballots. Similarly, in *Anderson v. Celebrezze*, 460 U.S. 780, the Court struck down a filing system that forced independents and minor parties to declare far earlier than major party candidates. The discrimination against small parties inherent in the Minnesota scheme is far worse than the restrictions in *American Party* and *Anderson v. Celebrezze*. Instead of being excluded from an absentee ballot as in *American Party*, or forced to organize at an inconvenient time as in *Anderson*, small parties in Minnesota are consigned by law to a symbolic protest role, effectively walled off from participation in the power aspects of the electoral process.

C. An Absolute Ban On Fusion Candidacies Imposes Unnecessary Constraints On The Autonomous Judgment Of A Major Party

Once a political party has been organized, and has developed a significant power base, this Court has recognized a need to protect the party from subversion from without and disintegration from within. Thus, efforts to protect established political parties from "raiding" by outsiders attempting a hostile takeover have been upheld by the Court, as have efforts to prevent "sore loser" disputes from destroying the party. *Rosario v. Rockefeller*, 410 U.S. 752 (upholding 11 month affiliation requirement for voting in primary); *Kusper v. Pontikes*, 414 U.S. 751 (invalidating 23 month affiliation requirement); *Storer v. Brown*, 415 U.S. 724 (upholding durational disaffiliation requirement before running as candidate of another party). But voluntary fusion candidacies, like the candidacy at issue in this case, pose no threat to the integrity or stability of a major party when the majority party has not objected to the fusion.

Where, as here, no threat to the integrity, or stability of a party exists, the Court has recognized that a political party must be free to make strategic decisions about how best to expand its power base. Whether it has involved a party decision to operate an "open" or a "closed" primary, or a decision to endorse an internal candidate, or to spend money in support of the party's own candidate, the Court has held that the strategic judgment of the party is immune to second-guessing by the state. *E.g., Tashjian v. Republican Party*, 479 U.S. 208 (party may decide to hold open primary, despite state law requiring closed primaries); *Democratic Party v. Wisconsin ex. rel La Follette*, 450 U.S. 107 (1981)(convention rule requiring closed primary takes precedence over state law requiring open primary); *Eu v. San Francisco Democratic Party*, 489 U.S. 1989 (invalidating ban on party endorsements of candidates in party primary); *Colorado Republican Party v. FEC*, 64 U.S.L.W. 4663 (government may not forbid independent expenditures by political party in support of party's candidate).[14]

In this case, a major party, the Democratic-Farmer-Labor Party, in an effort to increase its electoral base, made an apparent decision to cooperate with a fusion effort by the New Party. Such a strategic political decision is precisely the type of autonomous judgment that the Court has immunized from governmental control. If an established political party perceives an advantage in forging a formal electoral alliance with a third party, Minnesota is precluded by the First Amendment from vetoing that judgment.

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[14] When a political party functions as an integral part of the state-administered nomination process, it looses aspects of its autonomy and become subject to narrow regulation designed to protect the equal right to vote. *See Morse v. Republican Party of Virginia*, 517 U.S. __, 116 S.Ct. 1186 (1996); *Terry v. Adams*, 345 U.S. 461; *Smith v. Allwright*, 321 U.S. 649.

D. An Absolute Ban On Fusion Candidacies Violates A Candidate's Right To Embrace A New Constituency

No candidate can be compelled to serve as an involuntary standard bearer. But where, as here, a candidate wishes to accept the formal electoral support of a new constituency, the state may not lightly veto such an important political judgment. Unlike *Storer v. Brown*, 415 U.S. 724, where a decision to disaffiliate from one party in order to become the candidate of a rival party threatened to turn *intra*-party squabbles into a centrifugal force that could tear the party apart, fusion candidacies pose no immediate threat to the integrity or stability of either party-participant.

E. An Absolute Ban On Fusion Candidacies Insulates Major Parties Against Effective Third-Party Competition

Established political parties have an obvious stake in persuading the legislature to inhibit the emergence of powerful competitors. In the absence of a legislatively imposed ban on fusion candidacies, major parties would constantly be tempted to enter into fusion electoral alliances with third parties in order to increase the likelihood of winning a particular election, thereby allowing third parties to enter the arena of power. That is precisely what appears to have happened in this case.

It is at this point that anti-fusion law enters the equation. For, if law can be counted on to bar fusion candidacies, neither major party faces the threat of a genuine competitor. Laws banning fusion candidacies thus represent classic efforts to shield major parties from effective competition by newcomers. As such, they fall directly in the path of the decisions of this Court striking down efforts to prevent third parties from emerging as genuine competitors to

the major parties. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23; *American Party of Texas v. White*, 415 U.S. 767; *Anderson v. Celebrezze*, 460 U.S. 780. *See also Storer v. Brown*, 415 U.S. 724.

In both *Williams v. Rhodes* and *Anderson v. Celebrezze*, the Court invalidated state statutes that made it unfairly difficult to challenge the electoral hegemony of the two major parties. In *Williams v. Rhodes*, Ohio made it virtually impossible for a minor party to qualify for the ballot. In *Anderson v. Celebrezze*, filing deadlines made it extremely difficult for an independent candidate to challenge the two major parties. *See also Storer v. Brown*, 415 U.S. 724 (remanding for a determination of whether California's ballot access rules unfairly prevent third parties from achieving ballot status).

In this case, Minnesota permits third parties to obtain ballot status, but insulates the two major parties from the threat of real competition by making it unlawful for a third party to mount a fusion candidacy. Anti-fusion laws function, therefore, as government-imposed barriers to entry, shielding dominant parties from the threat of competition from newcomers. When barriers to entry unfairly block competition in an economic market, the anti-trust law provide a remedy. When government imposed barriers to entry unfairly block political competition, the First and Fourteenth Amendments require their removal.

F. Minnesota Has Clearly Failed To Carry Its Heavy Burden Of Justification

Minnesota's argues that banning fusion candidacies imposes merely a trivial burden on the right to vote, and to associate for the advancement of political ends. Since the burden is minimal, Minnesota argues, the state's burden of justification should also be correspondingly low. As *amici*

have demonstrated, however, banning fusion candidacies severely impinges on the right to vote, the right to run for office, and the right to associate for political ends. Whether the ban on fusion is viewed from the perspective of a third-party voter, the third party itself, the major party, or the candidate, an absolute ban on fusion candidacies imposes dramatic restrictions on the ability to engage in the democratic process. Only the most compelling showing of social need could justify such an incursion into political freedom.[15]

Not only has Minnesota failed to make such a showing, the justifications put forth in defense of the fusion ban do not even rise to the level of legitimate state interests.

Minnesota's first justification, that voters might be confused by the appearance on the ballot of a single candidate as the nominee of more than one party, is frankly contemptuous of the intelligence of the electorate. Voters are quite capable of understanding that a nominee has earned the support of more than one political party. In the context of commercial speech, this Court has emphatically rejected similar efforts to limit First Amendment activity in a paternalistic effort to rescue consumers from their alleged incompetence. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. __, 116 S.Ct. 1495 (1996). If paternalistic assumptions about consumer incompetence cannot justify censoring commercial advertising, surely a similar assumption of voter ignorance cannot justify a dramatic interference with political freedom.

[15] This Court has described the precise legal standard in varying terms, ranging from traditional strict scrutiny, to a weighted balancing test. *Amici* believe that the verbal articulation of the standard is less important than the consensus agreement that government regulations impinging on the democratic process must be nondiscriminatory, and be justified by a showing of grave need. *Burson v. Freeman*, 504 U.S. 191 (1992).

Minnesota's second justification, that fusion candidacies blur the clarity of electoral outcomes, is equally unavailing. The argument cannot be that fusion makes it more difficult to determine the winning candidate, since a simple exercise in addition is all that is necessary. Rather, the argument turns on an unspoken assumption that a candidate with support from two political parties is less entitled to the cumulative vote than a candidate of a single party. Thus, under Minnesota's assumption, a candidate with 9 votes from a major party, and 2 votes from a third party, is not a clear winner over a candidate who received only 10 votes from a major party. That argument is not, however, about the difficulty of identifying a winner. It is an argument in favor of entrenching the two-party system by law.

At bottom, Minnesota's opposition to fusion candidacies is not based on concerns about voter incompetence, or the inability to do simple addition. Rather, it is a concern that fusion may result in more finely tuned electoral behavior, with voters choosing to use a third-party fusion candidacy as a way of instructing the winner about how to govern. The result, Minnesota fears, will be a decline in the power of the two major parties, and a proliferation of more narrowly focussed political groupings.

Reasonable people may differ about the wisdom of funneling the nation's political energy into two "umbrella" political parties, who enjoy an exclusive franchise on political power. But the Court has never suggested that legitimate concern with the stability and integrity of the major political parties could mutate into laws entrenching them against effective political competition. *O'Hare Truck Service, Inc. v. City of Northlake*, __ U.S. __, 64 U.S.L.W. 4694 (June 28, 1996)(desire to stabilize major parties through political patronage cannot override First Amendment rights of free

speech and association); *Board of County Commissioners v. Umbehr*, __ U.S. __, 64 U.S.L.W. 4682 (June 28, 1996) (same).

Ultimately, the people will decide whether the existing two-party system is the best way to organize our political energy, or whether new forms of political organization are necessary to carry American democracy into the 21st century. Laws such as Minnesota's absolute ban on fusion candidacies that tilt the electoral playing field in order to entrench the major parties' monopoly on political power -- not because the people choose them freely, but because the election laws are rigged to exclude alternative choices -- have no place in our democratic life.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

Burt Neuborne
(*Counsel of Record*)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Elliot M. Mincberg
Lawrence S. Ottinger
People For the American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

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No. 95-1608

(7)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,
Petitioners,
v.
TWIN CITIES AREA NEW PARTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

DAVID A. NORCROSS
General Counsel
THOMAS J. JOSEFIAK
Counsel
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8854

JAN WITOLD BARAN
Counsel of Record
SCOTT S. HARRIS
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for the Republican National Committee as Amicus Curiae

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BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

This brief is submitted on behalf of the Republican National Committee ("RNC"), the national committee of the Republican Party.[1] Because this case directly affects the rights of political parties to nominate and elect their candidates for office without interference from the gov-

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[1] The RNC files this brief with the consent of both parties, as reflected in separate submissions to the Court.

ernment, it is one of vital importance to the RNC. The RNC brings a particularly valuable perspective to this issue because, while this statute affects the relationship between the government and both minor and major political parties, the only parties to the case are the government and a minor political party.

SUMMARY OF ARGUMENT

The Petitioners fundamentally misconstrue the rights at issue in this case. This case addresses not "the extent to which states must . . . maximize opportunities for minor political parties to have a significant impact" upon elections (Br. 8), but instead the extent to which states may *interfere* with the well-established and vitally important associational rights of political parties. The challenged statute, Minn. Stat. § 204B, effectively prohibits a political party from nominating for the ballot its chosen candidate where that candidate has already been nominated by another party. Because the Minnesota statute severely burdens political parties in their attempts to speak to the public and broaden their base of support, and does so for no legitimate reason in the particular circumstances of this case, application of the statute to the Respondent is unconstitutional.

This Court has repeatedly recognized the importance of the associational rights of political parties, and has explained that significant burdens upon the right of parties to nominate candidates for office must be narrowly tailored to a compelling governmental interest. As applied to this case, the Minnesota ban on individual candidates appearing on the ballot for more than one party, referred to as "fusion," severely burdens the ability of political parties to choose whom they would like to nominate for public office and to broaden their base of support. Indeed, the statute directly stymies political parties from carrying out their most fundamental activity. Thus, the ban is constitutional only if it is narrowly tailored to a compelling governmental interest.

As applied to the particular facts of this case, none of the offered justifications for the fusion ban are sufficient to meet this high standard. Rather than fostering voter confusion, fusion actually encourages a more informed electorate by providing additional information about candidates and their positions. Fusion bans are not narrowly tailored to prevent ballot manipulations because minor parties are fully capable of preventing "party raiding" through other (constitutional) means and because states are free to require minimum levels of support before candidates appear on the ballot.

The only governmental interest that might in some circumstances justify a ban on fusion is one that has been recognized repeatedly by this Court: the need to prevent "splintered parties and unrestrained factionalism." *See Storer v. Brown*, 415 U.S. 724, 735 (1974). In circumstances where two parties do not consent to a dual nomination ("involuntary fusion"), fusion permits losers in a party primary to form their own party and nominate the same candidate on a different party line in order to push their issues back into the public spotlight. Such a practice strikes at the heart of the party primary process, allowing the same intraparty battles to be fought for a second time during the general election. Where, as in this case, both parties consent to the dual nomination ("voluntary fusion"), there is no such danger, and this interest does not support the statutory fusion ban at all. Indeed, the Petitioners admit as much in their Opening Brief. *See* Br. 50. Therefore, application of this statute to the Petitioners is unconstitutional and the judgment of the court of appeals should be affirmed.

ARGUMENT

I. BECAUSE § 204B SEVERELY BURDENS THE NEW PARTY'S ASSOCIATIONAL RIGHTS, IT IS CONSTITUTIONAL ONLY IF IT IS NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST

A. Severe Restrictions Upon a Political Party's Access to the Ballot Are Subjected to the Strictest Scrutiny

American citizens undeniably enjoy a fundamental constitutional right to create, develop, and sustain political parties. *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968); *Norman v. Reed*, 502 U.S. 279, 288 (1992). This right "advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." *Norman*, 502 U.S. at 288. It thus assures an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

Central to the pursuit of common political ends is the right of all political parties, old and new, to select a "standard bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). For both political parties and voters, elections are "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986). The nomination of a standard bearer is a focal point for the creation of public policy, providing a mechanism for voters to engage in political debate and elect the candidates who best represent their views. Therefore, when a state severely restricts a political party's access to the ballot, this Court has required that the restriction be narrowly drawn to advance a compelling state interest. *Norman*, 502 U.S. at 288-89.

B. The Burdens Imposed by § 204B Are Particularly Severe

1. *Prohibiting a Party from Nominating Its Chosen Candidate Restricts Its Ability to Express Political Ideas and Participate in the Political Process.*

A political party's choice of a candidate is its defining moment. It is the culmination of often intense debate over the proper direction of the party and of government. Having emerged as the nominee of a party, the candidate comes to symbolize the party's goals and values to the public and to the party itself. The party rallies around the individual whom it believes best personifies its goals and whom it believes will be the best leader. The nomination thus becomes the outlet for all of the party's political speech and associational rights. While a party has its own interests and ideals separate and distinct from its candidates, "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*, 116 S.Ct. 2309, 2322 (1996) (Kennedy, J., concurring in part and dissenting in part). Because of the importance of the nomination process, denying a party the right to put its nominee on the ballot is a most fundamental restriction upon that party's autonomy and power.

Without the right to place its candidate on the ballot, there is less reason for party members to engage in the public debate in the first place. The center of a political party's existence is its ability to act as a vehicle for ordinary citizens to engage in government by learning about, nominating, campaigning on behalf of, and voting for candidates for public office. When a political party lacks the ability to serve as such a vehicle, like-minded citizens cannot fully participate in the political process. As this

Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983), "The exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."

Denying the New Party access to the Minnesota ballot forces it to choose between two unacceptable courses of action. First, the Petitioners suggest (Br. 18-19) that the New Party could decline to nominate another candidate, and instead merely endorse publicly another party's candidate. This option, however, relegates the New Party to the status of a mere bystander and removes the New Party from the public eye. Because the nomination process is so central to the party's function, merely speaking out on behalf of another candidate without actually seeing the party's endorsement on the ballot robs the party of its legitimacy. While the party can still speak out on behalf of that candidate, its speech *as a party* ultimately must take place on the ballot. Any other speech is hollow in comparison.

Second, Petitioners suggest that the New Party can nominate another candidate for the office in question. However, this requires the party to communicate to the public a view that its members do not actually believe, namely that its second choice is actually the candidate whom it would like to see elected. It prevents the New Party from expressing the exact ideas and policies it desires when it engages in the highest form of political expression. It forces the party to organize its resources, time, and efforts in support of a candidate whose platform the party may not feel is the best possible public policy or whom the party may not believe to be the most effective leader.

Indeed, this Court has repeatedly recognized the importance of our political parties' right to nominate and support candidates without interference from the govern-

ment. For example, in *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214 (1989), the Court invalidated a state law that prohibited political parties from endorsing candidates in a primary election. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), it recognized that parties have a constitutional right to permit non-members to vote in their primaries. In *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), and *Cousins v. Wigoda*, 419 U.S. 477 (1975), it upheld party rules governing the selection of national convention delegates over conflicting state law. And just last term in *Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*, 116 S.Ct. 2309 (1996), the Court explicitly rejected arguments that political parties pose any special dangers of corruption and recognized that they must be permitted to make unlimited independent expenditures in support of their candidates for federal office. This restriction upon party activity, which thwarts the New Party from performing its most fundamental role, is as odious an erosion of political parties' rights as any of these statutes and must be given the same exacting scrutiny.

2. *Preventing a Party from Nominating Its Chosen Candidate Restricts Its Ability To Broaden Its Public Support.*

A party's associational rights undeniably include attempts to "broaden the base of public participation in and support for its activities." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Banning voluntary fusion burdens these rights in two ways.

First, fielding candidates whom voters will identify with that political party educates the public about that party and enables it to attract like-minded voters. *See id.* The views of a party's nominee exemplify those of the party she represents. The nomination process forces the candidate to define her positions, and obtaining the nomina-

tion necessarily implies that party members have accepted those positions. Preventing a party from nominating a chosen candidate who enjoys a minimum level of support thus blocks the party from presenting itself to the public, thereby impeding its ability to attract like-minded voters.

Second, as the Eighth Circuit noted in this case, "[a] party's ability to establish itself as a durable, influential player in the political arena depends on its ability to elect candidates to office." *McKenna v. Twin Cities Area New Party*, 73 F.3d 196, 199 (8th Cir. 1996); *see also Williams v. Rhodes*, 393 U.S. at 31 ("[T]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."). A political party must convince potential members that it has the ability to get its candidates elected. Electoral viability encourages voters to join by demonstrating to potential members that their votes and efforts will positively affect the political process. Where a minor party is prohibited from nominating a candidate with a good chance of winning, however, new members will be discouraged from joining out of a fear that their votes will be wasted.

This impact need not be limited to getting a candidate elected on a single-party line. No less than a major party that elects a single-party candidate, a minor party that provides the swing votes that put a multi-party nominee over the top and into office substantially influences an election. This determinative impact on an election demonstrates to potential party members that the party is a meaningful participant in the political arena and worth joining. By precluding voluntary fusion, § 204B denies the New Party the ability to make this showing and thus severely burdens its First Amendment associational rights.

II. WHILE BANS ON INVOLUNTARY FUSION WOULD BE CONSTITUTIONAL, BANS ON VOLUNTARY FUSION ARE NOT NARROWLY TAILORED TO A COMPELLING STATE INTEREST

As noted above, the burden imposed upon political parties by a ban on electoral fusion is severe. The Petitioners present (Br. 40-50) a series of governmental interests that they believe are sufficient to justify these burdens, including the prevention of party splintering, voter confusion, and electoral distortions, along with promoting candidate competition. Despite the arguments set forth by the Petitioners, those governmental interests are simply insufficient to pass constitutional muster, at least in the context of the voluntary fusion at issue in this case.

The analysis would be different had the Democratic-Farmer-Labor Party not consented to Mr. Dawkins' appearance on the ballot under the New Party line. In that case, the state would have a significant interest in protecting the integrity of the primary election process by preventing intraparty disputes, which are properly resolved in the primary election, from spilling over into the general election campaign. In such a case, a ban on "involuntary fusion" would be narrowly tailored to further this very important interest.

A. So Long as the Major Party Does Not Object to Its Candidate Appearing on Both Lines of the Ballot, Preventing a Party from Nominating Its Chosen Candidate Does Not Serve the State's Interest in Preventing "Splintered Parties and Unrestrained Factionalism"

This Court has recognized the states' compelling interest in maintaining the integrity of the political process by preventing "splintered parties and unrestrained factionalism." *Storer v. Brown*, 415 U.S. 724, 735 (1974). To that end, the Court has upheld state election laws designed to

further the goal of having intraparty disputes resolved in the primary, rather than the general election. In *Burdick v. Takushi*, 504 U.S. 428 (1992), for example, the Court validated the Hawaiian ban on write-in voting that prevented dissatisfied cliques within parties from continuing to fight intraparty skirmishes past the primary stage through write-in candidates. Similarly in *Storer*, the Court upheld a California disaffiliation requirement that denied a general-election ballot position to independent candidates who either voted in the immediately preceding party primaries or had been affiliated with a political party during the year preceding the primary. By so doing, the California statute precluded "sore losers" from circumventing the primary's hurdle and, like the ban in *Burdick*, prevented them from continuing to fight already-settled debates.

A ban on involuntary fusion would be justified under the same reasoning. As the Petitioners make clear (Br. 47-49), fusion allows the continuation of intraparty debate when losing factions within a major party break off, form their own minor party, and then nominate the major party's candidate solely to push their own platform back into the spotlight. Those losing factions could then subvert the very process in which they had originally participated, just the type of injury this Court has recognized in cases such as *Storer* and *Burdick*. *See* William R. Kirschner, "Fusion and the Associational Rights of Minor Political Parties," 95 Colum. L. Rev. 683, 718 (1995) (suggesting that a ban on involuntary fusion is constitutional because involuntary fusion "subjects the internal decisions of political parties to the potentially destructive designs of forces external to these parties").

However, a ban on even voluntary fusion certainly is not justified under this rationale. Where a major party—the supposed victim of this practice—concurs with the second candidacy, there certainly can be no concern that the major party is being abused in the process. *See Eu*,

489 U.S. at 227 ("Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban . . . saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgments for that of the party."). The major party's consent would serve the state's interest in keeping intraparty squabbles off the general election ballot by forcing the major party to address whatever controversial issues might arise from the minor party's cross-nomination when consent is given. In fact, a ban on only *involuntary* fusion would accomplish all of the same goals with significantly less danger of infringing on the rights of other parties. Indeed, the Petitioners apparently concede this point, noting (Br. 50) that the lack of a consent inquiry makes the Minnesota statute "somewhat broader than necessary to accomplish its asserted interests." Because § 204B goes well beyond what is necessary to prevent political party splintering when applied to the facts of this case, it is not narrowly tailored to this admittedly compelling state interest.[2]

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[2] As this discussion makes clear, a political party attempting to nominate a candidate already on the ballot representing another party has no constitutional challenge to a fusion ban where both parties do not consent to the dual nomination. But even in the absence of such a ban, a party withholding its consent to a dual nomination may have a constitutional challenge where the rules of that party specifically prohibit multiple nominations. In such a case, the party withholding consent must, at the very least, be permitted to withdraw its nomination of the candidate who, contrary to party rules, accepts an additional nomination. Though the issue certainly is not represented by this case, this Court has repeatedly recognized the primacy of internal party rules over state laws that burden internal party dynamics. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Democratic Party of United States v. Wisconsin ex rel La Follette*, 450 U.S. 107 (1981); *O'Brien v. Brown*, 409 U.S. 1 (1972).

B. Preventing a Party from Nominating Its Chosen Candidate Does Not Further the State's Interest in Avoiding Voter Confusion

Similarly unfounded is Minnesota's argument that § 240B furthers the compelling governmental interest of preventing voter confusion that it asserts would arise when voters see two or more candidates listed under the same ballot.

First, the Petitioners' argument on this point simply underestimates the intelligence of the electorate. This Court has consistently held that highly paternalistic limitations on the information available to voters do not serve a state's legitimate interest in fostering an informed electorate free of confusion. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983). Instead, the Court has recognized that voters are capable of independent thought, that more information and more choice do not pose a threat to the electoral process. As this Court noted in *Eu*, 489 U.S. at 229, and *Tashjian*, 479 U.S. at 221, "A state's claim that it is enhancing the ability of its citizens to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *See also Norman*, 502 U.S. at 290 (invalidating an Illinois statute supposedly preventing voter confusion by completely prohibiting candidates in one political subdivision from using the name of established political parties in other subdivisions).

Indeed, rather than misleading voters about a candidate's positions (Pet. Br. at 43), voluntary fusion actually fosters an informed and educated electorate. Where the minor party has a narrower platform than the major party, multi-party nomination gives voters more specific information about a candidate's stances on certain issues. For example, a nomination by the Green Party suggests to voters that a Democratic Party candidate is not merely "good enough" on environmental issues to pass muster with the Democratic Party, but so strong that the "harder-

to-please" Green Party wanted to nominate him as well. Likewise, a majorty party's refusal to consent to a minor party's nomination also provides voters with more information: a major party allowing every minor party to nominate its candidate except one espousing radical views, for example, sends a clear signal to voters that the major party does not tolerate those radical positions.

Similarly, Minnesota's statute cannot be justified simply as a mechanism for preventing clutter on the ballot. Of course, Minnesota has no compelling interest in having an aesthetically pleasing ballot for its own sake. While its interest in preventing a laundry list of frivolous candidates from confusing voters may be characterized as compelling, *see Lubin v. Panish*, 415 U.S. 709, 715 (1974), this Court has upheld only those ballot-access restrictions that ensure that numerous frivolous candidates do not distract voters from the serious ones. To that end, states may require candidates to demonstrate a "modicum of support" so that frivolous candidates do not overcrowd the ballots. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (upholding a Washington requirement that denied general election ballot access to candidates who failed to garner 1% of the total votes cast in an open primary); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a law conditioning ballot access for those other than major party nominees on a nominating petition signed by 5% of eligible voters).

Constitutionally suspect, on the other hand, are laws such as this one that do not consider whether parties or candidates are "serious or spurious," but instead exclude parties and aspiring nominees from the ballot for reasons unrelated to their electoral viability. *See Lubin*, 415 U.S. at 717 (holding that California may not exclude an indigent from the ballot solely because of his inability to pay a filing fee); *American Party of Texas v. White*, 415 U.S. 767, 794-95 (1974) (overturning Texas law allowing absentee ballots to contain only the names of the

Democratic and Republican parties). Minnesota's signature requirement and other qualifications for minor party status already weed out frivolous parties and candidates, thus negating the Petitioners' claim that fushion invites the development of longer and more complex ballots. Because these other requirements automatically block the development of confusing ballots, a ban on voluntary fusion does not further any compelling state interest related to voter confusion.

C. Preventing a Party from Nominating Its Chosen Candidate Does Not Further the State's Interest in Preventing Manipulation of the Ballot

The Petitioners posit (Br. 45) that prohibitions on fusion further the goal of preventing ballot manipulations in two ways: (1) by making it more difficult for parties to disrupt each other's primary processes through "party raiding"; and (2) by preventing major parties from placing their candidates on the ballot more than once and presumably increasing the likelihood of receiving votes. Neither comes close to justifying the significant burden placed upon new parties by this statute.

Although Minnesota enjoys a legitimate interest in preventing party raiding, *see Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973), electoral fusion is wholly unrelated to that interest. First, the factual scenario that the Petitioners posit is so improbable as not to merit serious consideration by this Court. Members of a major party could not infiltrate a minor party so as to disrupt the latter's internal processes without drawing significant—and quite adverse—public attention. But more fundamentally, numerous cases from this Court make clear that all political parties enjoy the freedom to impose reasonable limitations upon participation in their own primary elections. *See, e.g., id.* at 762 (upholding a New York law imposing a waiting period before new members may vote in party primaries); *Storer v. Brown*, 415 U.S. 724, 733 (1974) (sustaining the validity of a one-year

party disaffiliation requirement for independent candidates). Indeed, the very case cited by the Petitioners as evidence that such raiding can occur, *Zuckman v. Donahue*, 80 N.Y.S.2d 698 (App. Div.), *aff'd*, 81 N.E.2d 371 (N.Y. 1948), upheld the right of the minor party to exclude the "raiders" from participating in the minor party election. This minor party, like others under this Court's clear precedent, is more than capable of guarding against such a threat without the "protection" of statutory prohibitions.

Nor is banning voluntary fusion narrowly tailored to the state's asserted interest in reserving the printed ballot for parties with minimum levels of support. If the state's concern were a minor party's ability to obtain an automatic place on the next general election ballot for all of its candidates solely by garnering 5% of the electoral votes for a fusion candidate, the state could readjust its ballot access laws to address that fear more directly. Though the issue of "disaggregation" is not presented by or necessary to this case, Minnesota could deny automatic general election ballot access to such parties until they nominate single-party candidates who demonstrate a certain level of support. *See* Note, "Fusion Candidacies, Disaggregation, and Freedom of Association," 109 Harv. L. Rev. 1302 (1996). This would still enable minor parties to nominate their chosen candidates and prove their electoral viability while still meeting Minnesota's interest in reserving automatic spots on the general election ballot for parties that have demonstrated a certain level of voter support.

D. Preventing a Party from Nominating Its Chosen Candidate Does Not "Promote Candidate Competition"

The Petitioners' novel suggestion that precluding voluntary fusion is justified because it "promotes candidate competition" simply flies in the face of reason. This Court's party-autonomy jurisprudence emphasizes the de-

sirable notion that "competition in ideas and government policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Competition, whether in the electoral arena or in the marketplace, is not promoted when the government forces inferior goods or candidates into the market. The government cannot coerce a political party to nominate someone other than its first-choice candidate in order to promote the type of debate that the government sees as healthy. It is not the place of the government to conclude, as the Petitioners in this case have (Br. 20), that the New Party nomination "would have done nothing to enhance the choice of candidates available to the voters." Rather, it is left to the citizens—and to associations of citizens that make up the parties—to determine which ideas will be propounded and by which nominees.

CONCLUSION

For these reasons, the Republican National Committee urges this Court to rule that Minnesota's ban on dual nominations is unconstitutional as applied to this case and to affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

DAVID A. NORCROSS
General Counsel
THOMAS J. JOSEFIAK
Counsel
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 883-8854

August 19, 1996

JAN WITOLD BARAN
Counsel of Record
SCOTT S. HARRIS
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for the Republican National Committee as Amicus Curiae

(9)

No. 95-1608

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and Joan Anderson Growe, Secretary of the State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICI CURIAE OF THE REFORM PARTY, THE PEROT REFORM COMMITTEE, AND PEROT 96 IN SUPPORT OF RESPONDENT

J. GREGORY TAYLOR
Counsel of Record
HUGHES & LUCE, L.L.P.
1717 Main Street
Suite 2800
Dallas, TX 75201
(214) 939-5500

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INTERESTS OF AMICI CURIAE

This brief is submitted in support of the respondent Twin Cities Area New Party by the Reform Party (an affiliation of supporters of local and Reform Parties throughout the United States), the Perot Reform Committee, and Perot 96 (collectively referred to herein as "the Reform Party"). Because this case directly affects the First Amendment rights of political parties in general to nominate and elect candidates without state interference, and the rights of minor parties in particular to operate free from state regulations burdening them disproportionately *as* minor parties—and ultimately to compete meaningfully and contribute meaningfully to the formation of public policy—it is of critical importance to the Reform Party that the decision below be affirmed.[1]

While the Reform Party's broad interest in relegalizing fusion is identical to that of the New Party, our experience and stature are distinct in ways bearing on the State's argument in this case. That argument suggests that in doing the otherwise hard work of minor-party building, fusion permits the substitution of theft for honest toil—that it provides an illegitimate means by which minor parties can "bootstrap" their way to ballot status or to maintaining that status. It also suggests that the tactic is important only to truly tiny and poorly resourced minor parties. And it argues that fusion provides an unconscionable form of "affirmative action" for minor parties, and that the demand for this right amounts to a demand for state subsidy of minor party growth.

These arguments are baseless. As the New Party rightly argues, fusion does not amount to "affirmative

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[1] The Reform Party files this brief with the consent of both parties, as reflected in separate submissions to the Court.

action" for minor parties; it simply removes an artificial wedge between the real level of minor party support that exists in the electorate and the level that can be prudently expressed at the polls. As the New Party rightly argues, fusion does not sanction theft, but recovery—of the votes that would have gone to a minor party but for the fusion ban the New Party rightly argues, the votes cast for "fusing" minor parties—however small—are no less legitimate or real than any other votes, and therefore no less worthy of counting in determining ballot access. And as the New Party rightly argues, it is essential that ballots be designed in a "disaggregated" fashion—with separate ballot lines for the different parties nominating a fusion candidate—permitting those votes to be used that way. Emphatically, the Reform Party joins the New Party in making all these claims.

Still, the very "minor" stature of the Twin Cities Area New Party, and the national New Party generally, may themselves give doubt about the legitimacy of those claims. And so, as a much better resourced and successful minor party than the New Party, the Reform Party wishes here to join the argument. With a credibility that New Party may be thought to be lacking, the Reform Party wishes to argue that fusion is important to minor parties, *whatever their resources*, merely because of their status as minor, as a result of the familiar dynamics of our "winner take all" election system.

Unlike the New Party, we and our supporters have already run someone for President of the United States, gaining a larger share of the vote than any other 20th Century "minor" party since former President Theodore Roosevelt. Unlike the New Party, we and our supporters command easy access to national TV and other media. Unlike the New Party, we have achieved and maintained ballot status in some 28 states, and will shortly be running

our 1996 Presidential candidate on ballot lines identified with us in virtually all 50. Unlike the New Party, we have access to millions of dollars in public funds to support that candidacy. Unlike the New Party, we have more than a million members. Unlike the New Party, we have access to countless other millions of dollars through the contributions of those members.

And still, *like* the New Party, we deem the right to fuse *essential* to our ability to grow and to advance the political interests of our members and supporters—and the denial of that right to oppose an unconscionable burden on core rights guaranteed by the First and Fourteenth Amendments.

SUMMARY OF ARGUMENT

By infringing the rights of minor parties to nominate "whatever candidate" they choose, and by burdening the rights of minor parties to operate free of election law restrictions falling disproportionately on them as minor, Minnesota's absolute ban on fusion violates core values protected by the First and Fourteenth Amendments. This violation is no more severe for a poorly-resourced minor party than one with millions of members and ample resources to conduct national campaigns. The reason is that it goes to core rights of political parties and their supporters —however large that party and its members—and the core rights of minor parties—whatever the variation in their size and resource and membership base—*as* minor parties.

ARGUMENT

The Reform Party has played a key role in the establishment and development of qualified state parties in 28 states. Recently the Reform Party held its founding

convention, nominating Ross Perot as its presidential candidate for 1996. Mr. Perot will run on its line in the 28 states where the party is now qualified, and will run as an independent presidential candidate (but with a Reform Party label) where such an independent candidacy is prerequisite to the Reform Party's securing permanent ballot status as a political party. The Reform Party fully expects that votes cast for Perot in those remainder states will soon result in the qualification of established Reform Parties in many of them. It is our hope that these parties will soon operate "up and down" the ballot—not only running candidates for President, but also for the United States Senate and House of Representatives, and in state and local races.

There should be no question about the seriousness of this effort. In his independent run for the Presidency in 1992, Mr. Perot received a larger share of the popular vote than any "third party" candidate since former President Theodore Roosevelt. The Party boasts more than a million members, and Mr. Perot and the Party are now generally seen as important forces in American electoral politics—and as having made a contribution to voter mobilization and the range of political debate within it.

Even given this record of success, the Reform Party considers the restoration of a right to fusion indispensable to our growth and effective advocacy for the values of our members. This belief is reflected in our efforts to date: where fusion is currently legal, we or closely allied efforts —*e.g.*, in Minnesota, the Independence Party that is now affiliated to our national effort—have already attempted to use it, and we will use it in New York and other places where it is currently legal. The belief is also reflected in our strategic planning: we envision, like the New Party, running a mix of candidates, some nominated by us alone, some jointly-nominated by us and other parties.

Our appreciation of the importance of fusion is founded on the clear and uncontestable evidence that it provides minor parties the best way, in the American "winner take all" election system, to grow in ways respectful of their values. The Reform Party is an issue-centered party, not a candidate-centered one. If a Democrat or Republican shares our positions on the issues, we are perfectly open to supporting them, and wish to support them if we do not have a more viable alternative candidate. We have no interest in "splintering" American politics. We do have an interest in promoting the distinctive ideology and program of those who associate in the advancement of their political beliefs through us, and in securing the ongoing viability and visibility of that association. In many cases, for a minor party, that is best done by a ballot alliance with a major party. In addition to avoiding the "wasted vote" syndrome that artificially suppresses minor party growth, the very fact of that alliance draws attention to its terms: *viz.* the values upon which the minor party offers its support. For the Reform Party, drawing attention to those values, developing effective means of publicizing them to candidates as the basis of our support, and disciplining office-holders whose election we account for on the basis of them, are our most important task. We wish to implement a new national agenda for public action in America, irrespective of the "home base" partisanship of those who are willing to carry it to implementation. Fusion is critical to us in doing that, in ways consistent with our own organizational integrity and strength.

Thus, with the New Party, the Reform Party asserts that the rights of a political party to substantial autonomy in the governance of its own affairs, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Norman v. Reed*, 502 U.S. 279 (1992), and the right to exercise that autonomy free of regulations

disproportionately burdensome to new or minor parties, *Anderson* v. *Celebreeze*, 460 U.S. 780 (1983), are fundamental freedoms enjoying direct protection under the First and Fourteenth Amendments. And with the New Party, we assert a right not only to choose our standard bearers freely, but to communicate that choice to our supporters on terms equal to those offered other parties, and to do so on our own separate ballot line. We consider these rights well-founded in the Constitution, and long-standing precedents of this Court.

We are frankly appalled that the State of Minnesota, or any state, would interfere with the right of a party to choose its candidates. Free political competition is literally meaningless if such a right can be simply and absolutely abridged—as Minnesota's absolute ban on fusion clearly and absolutely abridges it. We think fundamental notions of constitutional fairness *require* that the ballot be offered on equal terms to any party qualifying for access to it. And we believe that not offering jointly-nominating parties separate ballot lines for that fusion nomination defeats the very purpose of electoral competition—which is to signal to candidates and other policymakers, as well as other voters, the real character and distribution of electoral sentiment. We also think that not offering a "disaggregated" ballot in the fusion context will create all manner of unnecessary mischief and confusion in determining ballot access and maintenance. Conversely, offering that ballot will provide what historical and contemporary evidence both show to be a legitimate and administratively attractive way to keep ballot maintenance "tied" to actual vote performance. Recognition of this right to a disaggregated ballot is not essential to upholding the opinion of the Court below, however, and even without its recognition fusion remains vital. It permits the Reform Party to signal its support of particular candidates to our members and other supporters, and enables us, in doing that and

thereby mobilizing their support, to make some demonstration of our "worth" to fusion candidates.

The State's arguments in defense of Minnesota's absolute fusion ban are well answered in the New Party's brief, which the Reform Party fully endorses. The interests asserted by the State are either illegitimate or not sufficiently weighty or narrowly advanced by the ban to justify the burden on core freedoms that it imposes.

What we can add to New Party's argument, again, is chiefly the credibility that comes of our greater experience and size. Having spent countless hours and significant sums over the past few years struggling to establish a minor party in the United States, we are impatient with those who would ever more deliberately skew the playing field against them—while suggesting that any effort to right that field constitute illegitimate "subsidy" to their efforts on it. This argument is clearly preposterous on its face, and even more preposterous upon even casual examination of the real practice of "hardball" politics, and the tortuous rules on ballot status acquisition and maintenance—themselves often administered by openly partisan officials—that currently impede the progress of minor parties in the United States, and that have greeted our unusually well-resourced effort to build one. At every step of the way in Reform Party growth, we have faced well-financed, politically powerful, opposition to our efforts from the major parties, holding a *de facto* monopoly on legislative and executive power, and responsible for the nomination of those who would judge the legality of its exercise. This Court should be assured, if it has any doubt on the matter, that minor parties will face obstacles aplenty even upon its striking down Minnesota's absolute fusion ban.

Having had the hard experience of growing a party based most essentially on respect for political freedom and

decentralized democratic principles, we are also impatient with those who would curb that freedom, and substitute their judgment for that of our members and supporters, in the conduct of their political association. Who or what is Minnesota to say how its citizens should associate? Is this not the most fundamental of American freedoms? How could this Court permit such a fundamental and irrational abridgment of those freedoms, when the abridgment only serves the purpose of confusing elected officials about what the people really believe, and stifling the growth of minor party competition to the major political associations that already exist?

We firmly believe this Court cannot. Consensual fusion does no harm to anyone except those who would artificially frustrate political alliance, the growth of minor parties, and clearer and more vigorous assertion of the popular will. And those interests should enjoy absolutely no respect from this Court.

CONCLUSION

For these reasons, we urge this Court to affirm the judgment of the court of appeals.

Dated: August 29, 1996.

Respectfully submitted,

J. Gregory Taylor
Counsel of Record
Hughes & Luce, L.L.P.
1717 Main Street
Suite 2800
Dallas, TX 75201
(214) 939-5500

No. 95-1608

IN THE
Supreme Court Of The United States
October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Review, and JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,

Petitioners,

v.

TWIN CITIES AREA NEW PARTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE CONSERVATIVE PARTY OF NEW YORK AND LIBERAL PARTY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF RESPONDENT

RORY O. MILLSON
Counsel of Record
Cravath, Swaine & Moore
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

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BRIEF OF THE CONSERVATIVE PARTY OF NEW YORK AND LIBERAL PARTY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The Conservative Party of New York State ("Conservative Party") and the Liberal Party of New York State ("Liberal Party") submit this brief in support of Respondent Twin Cities Area New Party ("New Party") and the decision of the Court of Appeals for the Eighth Circuit holding unconstitutional Minnesota's law banning fusion candidacies—that is,

candidates nominated to the same office in the same election by more than one party.[1]

Because New York permits fusion candidacies,[2] each of the Conservative and Liberal Parties has frequently nominated a standard bearer who is also the nominee of another party, typically the Democratic Party or the Republican Party. Fusion has enabled the Conservative and Liberal Parties to compete effectively since their founding in numerous races under New York's election laws; if those laws were changed to ban fusion, the Conservative and Liberal Parties could not do so. Thus, both the Conservative and Liberal Parties and voters, including members of the Conservative and Liberal Parties, have interests that may be adversely affected by a fusion ban.

First, a fusion ban would deprive the Conservative and Liberal Parties of their right to select a standard bearer who best represents the party's ideologies and preferences. Not only do the major parties enjoy this right, but a fusion ban would penalize the Conservative and Liberal Parties disproportionately in that they would likely be the parties that lose their chosen standard bearer. A fusion ban thus imposes on the minor party, and not the major party, a Hobson's choice—to have no standard bearer identified on the ballot at

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[1] All parties have consented to the filing of this brief. Letters of consent have been submitted to the Clerk.

[2] Pursuant to N.Y. Elec. Law §§ 6-120, 6-146(1) (McKinney 1978 & Supp. 1996), fusion candidacies are permitted provided that the candidate and the party of which the candidate is not a member consent. New York's election laws use the terms "political parties" and "independent bodies", each of which can get a line on the ballot after meeting certain statutory requirements. *See, e.g.*, N.Y. Elec. Law §§ 6-104, 6-142 (McKinney 1978 & Supp. 1996). For ease of reference, we use the term "minor parties" when discussing the New York experience and use it in the colloquial sense—namely, to refer to a party other than the Democratic and Republican parties, the "major parties".

the general election or to pick a standard bearer who *second* best represents its ideologies and preferences. Moreover, a fusion ban such as Minnesota's would deprive minor parties and voters of the identification on the ballot of the fusion candidate as the minor party's standard bearer. Minnesota would suppress the direct identification of the candidate with the minor party and thus deprive voters of truthful information that promotes the informed exercise of the franchise.

Second, a fusion ban would deprive the Conservative and Liberal Parties and voters, including members of the Conservative and Liberal Parties, of their right to an effective franchise. Voters under New York's statutory scheme can cast ballots for a fusion candidate on the lines of any party that nominated the candidate, so that voters through their choice of line can identify which portion of the candidate's platform they wish to support. A fusion ban would thus deprive the Conservative and Liberal Parties of the ability to appeal to voters to make use of an important vehicle for expressing their political views And without fusion New York voters would be forced either to "waste" their votes on a candidate unlikely to succeed or to offer undifferentiated support to a major party candidate.

SUMMARY OF ARGUMENT

New York's actual experience since fusion was re-legalized in the mid-1930s shows that fusion promotes core associational rights of political parties and voters. *See* Point I.A., *infra*. Fusion has contributed to New York's competitive political system by conferring significant benefits on candidates, parties—both minor and major—and voters and, indeed, fusion has made the difference in many electoral outcomes. As Minnesota concedes (Appellate Brief ("App. Br.") at 4), fusion is a significant electoral factor in New York.

New York's experience with fusion shows why Minnesota's fusion ban is unconstitutional. *See* Point I.B., *infra*. *First*, a fusion ban improperly restricts the rights of each party to choose the standard bearer who best represents its ideologies and preferences. Moreover, Minnesota goes beyond interference with the party's autonomy; it discriminatorily prevents a minor party from identifying its candidate on the ballot, thereby depriving voters of truthful information that is useful in the ballot box. *See* Point I.B.1, *infra*. *Second*, a fusion ban is not a reasonable and nondiscriminatory burden. Minnesota's fusion ban suppresses accurate information about a candidate's party affiliation; it denies the minor party, and not the major party, its choice of standard bearer; and it deprives the minor party, and not the major party, of its place on the ballot. Contrary to Minnesota's argument, New York's practice of providing a separate line to each party's candidate if the party meets the ballot requirements does not constitute preferential treatment of minor parties. If a state is going to provide separate lines for parties that meet the ballot requirements, there is no good reason to deny such a line—and many good reasons not to deny such a line—to a party *if and only if there is a fusion candidate*. *See* Point I.B.2 *infra*. *Third*, a fusion ban improperly undermines the effectiveness of the franchise. It

takes away a tool for minor parties, especially new parties such as the New Party, to build coalitions, and voters to express their preferences. In New York, voters can vote for a fusion candidate on the line of any of the nominating parties that have met New York's ballot requirements, so that voters can—and do—vote for a fusion candidate on the line that most accurately reflects their views. This results in a more accurate measurement of minor-party support and an increase in electoral competition and choices available to voters. *See* Point I.B.3, *infra*.

New York's actual experience since the mid-1930s also refutes Minnesota's speculations about the effects that fusion will have on the alleged state interests it asserts to justify infringing core rights of political parties and voters. *See* Point II, *infra*. *First*, fusion has not caused voter confusion. Not only is there no evidence of voter confusion in 60 years in New York, but voters benefit from the choices provided by fusion. *See* Point II.A, *infra*. *Second*, contrary to Minnesota's argument that a fusion ban promotes competition by "reserving limited ballot space for opposing candidates", fusion has actually increased competition because fusion forces candidates to announce and refine their positions on issues that are important to voters. *See* Point II.B, *infra*. *Third*, contrary to Minnesota's speculation about party raiding, fusion has not led to party raiding in New York because consent is required. *See* Point II.C *infra*. *Fourth*, even if the state had an interest in maintaining the distinct identity of the two major parties (*i.e.*, preventing party splintering), the experience of New York has been that the use of fusion has not undermined the two major parties. *See* Point II.D, *infra*.

ARGUMENT

I. A FUSION BAN BURDENS CORE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES AND VOTERS.

A. Fusion Has Promoted Core Associational Rights of Political Parties and Voters in New York.

The Liberal Party was founded in 1944, and the Conservative Party in 1962. Since its founding, each party has been an active participant in election races in New York at the local, statewide and national levels. For example, each party has nominated candidates in each presidential election, each U.S. senatorial election, each gubernatorial election, each New York City mayoral election and numerous other races.

Like the major parties and the New Party (Joint Appendix ("J.A.") at 6), each of the Conservative and Liberal Parties seeks to promote candidates that best represent its ideologies and preferences, to use the electoral process to advance its program and to widen its support in the general electorate. In furtherance of these goals, each of the Conservative and Liberal Parties has nominated candidates running exclusively on either the Conservative or Liberal line. For example, in 1969, John Lindsay was elected Mayor of New York City on the Liberal line and, in 1970, James Buckley was elected to the U.S. Senate on the Conservative line. And, more frequently, each party has nominated as its candidate for office a person who has also been nominated by another party.[3] In 1990, for example, the Conservative Party nominated a candidate who was also the nominee of another party in 99 of the 116 races in which it participated, and the Liberal Party nominated a candidate who was also the

[3] There have often been Liberal-Democratic or Conservative-Republican fusion candidates, and, less frequently, Liberal-Republican or Conservative-Democratic fusion candidates.

The Conservative and Liberal Parties' active role in New York elections depends on their ability to nominate fusion candidates under New York's ballot access laws.[4] Under New York law, any political organization that polls at least 50,000 votes in the last preceding election for its candidate for governor is considered a political "party", entitled to a line on the ballot. N.Y. Elec. Law §§1-104(3), 7-102-06 (McKinney 1978 & Supp. 1996). Because each of the Conservative and Liberal Parties meets this ballot requirement, which applies to all political parties, the Conservative and Liberal Parties, like the Democratic and

[4] After the institution of the secret (*i.e.*, "Australian") ballot in 1890, states began to regulate both ballot access and the form of the new official ballot in order to prevent competitive challenges to the major parties. *See* Steven J. Rosenstone et al., *Third Parties in America* 19-20 (1984). There have been several attempts in New York to outlaw fusion and thus prevent competitive challenges, but each time such legislation was passed, New York courts have struck down the statutes and "re-legalized" fusion. Daniel A. Mazmanian, *Third Parties in Presidential Elections* 125 (1974). The first attempt to outlaw fusion came in 1896, but this law was struck down in 1910 as "an unreasonable and arbitrary limitation on the right to nominate qualified people for office". Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes*, 47 Colum. L. Rev. 1207, 1211 (1947) (citing *In re Callahan*, 93 N.E. 262 (N.Y. 1910)). The second attempt occurred in 1911, when Tammany Hall Democrats in New York passed a law which banned multiple ballot placement. *See id.* at 1211 (citing *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911)). The New York Court of Appeals struck down this law as unconstitutional, reasoning that because the law made straight-ticket voting more difficult for voters supporting fusion candidates, the law was discriminatory. *Hopper*, 96 N.E. at 374. The final attempt to outlaw fusion came in 1930, when the legislature tried again to stop fusion by prohibiting multiple ballot placement in certain circumstances. *See* Note, *The Constitutionality of Anti-Fusion and Party Raiding Statutes*, *supra*, at 1211-12. This too was struck down. *Id.* (citing *Matter of Crane v. Voorhis*, 178 N.E. 169 (N.Y. 1931)).

Republican Parties, are entitled to a line on the ballot identifying each candidate they have nominated.[5] The result of permitting fusion in New York is therefore that a fusion candidate of two "parties" is listed on more than one party line.[6]

The "essential attribute" of this fusion system "is the options it provides to both individual voters and political parties". Mazmanian, *supra*, at 134. This scholarly description is borne out by the facts.

Just as major party labels on the ballot benefit the electoral process because they are informative,[7] fusion

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[5] New York's practice of separate lines for each of the political parties supporting a fusion candidate has been called "disaggregation" by some commentators. *See, e.g.*, Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 Harv. L. Rev. 1302, 1309 (1996). Although this brief sometimes uses that term, a note of caution is in order. The Conservative and Liberal Parties do not now argue that they have a constitutional right that votes for a fusion candidate on their lines be counted separately from the votes for the fusion candidate on the major party line; New York's election laws already provide for such separate counting. This issue might arise, however, in New York if either of the major parties eliminated all reference to political parties from the ballot, which we think is unlikely, or the ballot access requirements were revised in order to reduce the role of minor parties.

[6] This result does not depend on the presence of a Conservative or Liberal Party candidate on the ballot. In New York, there are contests where the same candidate is nominated by both the Democratic and Republican Parties; and the candidate is place on a separate line for each party. *See, e.g.*, *The Green Book 1984-1985, Official Directory of the City of New York* 4 (1985) (election of Ed Koch as Mayor of New York on both the Democratic and Republican tickets). For the Court's convenience we have lodged with the Court relevant sections of *The Official Directory of the City of New York* (now known as *The Green Book*) and *The New York Red Book*.

[7] As this Court has stated, "To the extent that party labels provide a shorthand designation of the views of party candidates on matters of

promotes the informed franchise because a fusion nomination gives a voter information about the candidate's views. For example, in New York, a coalition of the Republican Party and the Right to Life Party gives a voter specific insight about the candidate's views. *See Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir.), *cert. granted*, 116 S. Ct. 1846 (1996). Because a fusion candidate is nominated by more than one party, the candidate and parties must be very clear about which positions of which platforms are in common. This attention to issues assists voters who are increasingly casting their ballots according to a candidate's position on issues, and less according to "character" or party line. *See* Norman H. Nie, et al., *The Changing American Voter* 168-69 (1976).

Fusion increases competition in the marketplace of ideas by fostering political diversity.[8] Indeed, Minnesota quotes, without refutation, testimony that fusion "permit[s] electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in

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public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986).

[8] Minnesota's contrary claim (App. Br. at 20) is unsupported by any citation. Moreover, it is inconsistent with other parts of its brief where Minnesota concedes that the ideas generated by minority parties increase political diversity (App. Br. at 9) and that political diversity is a good thing. (App. Br. at 45) New York's experience refutes Minnesota's further assertion that a fusion ban fosters political diversity by encouraging minor parties to run their "own" candidates. (App. Br. at 44-45) Minnesota wrongly assumes that the mere addition of an alternate name on the ballot translates automatically into increased diversity of political debate. In fact, New York's experience reveals that the opposite is often true. Without fusion, expression of minor party ideas is actually stifled because of the "wasted vote syndrome". *See* pp. 10-12, *infra*. Therefore, it is the practice of fusion, and not a ban, that fosters political diversity.

the selection of mainstream candidates". (App. Br. at 5) Moreover, "the ability of the third parties to survive over time makes them vehicles for new issues and programs that would otherwise have to await acceptance by a much broader audience before the major parties would address them." Mazmanian, *supra*, at 135.

Consequently, fusion generates a diversity of ideas, and provides voters in the election booth with a ballot containing "a greater variety of choices among party platforms and candidates than does a two-party contest." Mazmanian, *supra*, at 134. Indeed, by choosing to vote for a fusion candidate on a particular party line, New York voters can register their preferences of candidate, party, *and* policy platform in an election—because they can vote on either party line and thus have a choice of indicating support for the policy platform of one party rather than the other. Thus, if the voter prefers the policy platform of the minor party, she can cast her vote for the candidate on that party line; by voting for a candidate on the Conservative or Liberal line rather than on the line of one of the major parties, a voter states that it is the conservative or liberal position of the candidate's platform that she supports. Similarly, a voter can vote for a fusion candidate without necessarily supporting the major party. For example, a Democrat who does not like her own party's nominee but does not want to vote for a candidate on the Republican line can vote for a Republican-Liberal candidate for Mayor of New York City on the Liberal Party line rather than on the Republican Party line. (*See* p. 13, *infra*.) Fusion thus promotes voters' associational rights, and fusion, coupled with "disaggregation", promotes those rights with special force.

By providing these choices to voters, fusion alleviates "the wasted vote syndrome"; New York's "system does not force voters to choose between 'throwing their vote away' or voting for one of two major parties". Mazmanian, *supra*, at 135; *see*

also Affidavit of Walter Dean Burnham. (J.A. at 15)[9] As political scientists have recognized, because minor party candidates standing alone are usually perceived to have relatively little chance of winning a major election, many voters are hesitant to vote for a minor party candidate because of the self-fulfilling prophecy that a minor party candidate has little chance of winning. *See e.g.*, Mazmanian, *supra*, at 134-35. This fear of "wasting" a vote has become an even more significant problem because the number of voters that consider themselves independent has risen,[10] even though the two major parties are still dominant at the polls. Thus, the number of independent-minded voters who may prefer not to vote at all rather than demonstrate support for a major party or risk wasting their vote is increasing. *See, e.g., Disgruntleds Have It*, Economist, Nov. 5, 1994, at 23, 23.

Voters obviously benefit from fusion because they can vote their actual preferences without wasting their votes.

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[9] Minnesota did not submit any evidence to refute Professor Burnham's declaration; instead, it argues to this Court that Professor Burnham's assertion is a "dubious generalization". (App. Br. at 26) Our experience, together with the scholarly views described in the text of this brief, refutes Minnesota's rhetorical flourish.

[10] In New York, for example, there has been a growth in independent voters. Between 1970 and 1990, the percentage of voters registered as "Independent" in New York more than doubled; independent voters accounted for 22% of the electorate by 1996. *See* New York State Board of Elections, *Voter Enrollment as of April 1, 1996*, Compiled by Marcia Watson (1996). Party loyalty has declined. *See also* Nie et al., *supra*, at 166 (stating that "the American public has entered the electoral arena since 1964 with quite a different mental set than was the case in the late 1950's and early 1960's. They have become more concerned with issues and less tied to their parties."); *see also* Kevin V. Mulcahy and Richard S. Katz, *America Votes: What You Should Know About Elections Today* 84 (1976) (observing that the metamorphosis of the American voter from a party- to an issue-oriented voter centered around the introduction and debates over civil rights, Vietnam, and poverty).

Moreover, minor parties benefit because, without fusion, there is an undervaluation of minor party support (and an overvaluation of major party support), which detracts from the prestige of the party, makes it harder for the party to attract votes, to recruit new members, and to attract viable candidates.[11] Contrary to Minnesota's assertion that lifting a fusion ban would take a minor party's associational rights a "step further" (App. Br. at 14), it is the ban itself that prevents a minor party from fully measuring its support. And, because those effects are ongoing, the minor party support can never be accurately measured without fusion.

Because fusion allows for accurate measurement of minor party support, it provides new parties a powerful means of quickly making an impact on the electoral scene. For example, in 1944, Franklin D. Roosevelt agreed to be the Liberal Party's first nominee, which helped the Liberal Party to gain immediate acceptance. Without fusion, the Liberal Party would not have been able to establish itself at all. Moreover, the size of the vote for Roosevelt on the separate Liberal Party line allowed voters to send a message about the appeal of the Liberal Party and provided Roosevelt's margin of victory. Thus, fusion "allows third parties to retain their specialized constituencies while contributing to election

[11] For example, those with the experience and public stature necessary to be viable candidates could hesitate to run solely on the ticket of a minor party which, by definition, has fewer resources to support its candidate than a major party. This problem is exacerbated as the geographic scope and cost of the campaign increase. This problem is critical in New York, for example, since a party must win 50,000 votes in each gubernatorial election to maintain its status as a party and its line on the ballot. N.Y. Elec. Law §§1-104(3), 7-104(5) (McKinney 1978 & Supp. 1996). Meeting this mark would require a new or minor party to commit resources to the gubernatorial election that might be better spent in other local and state races—races in which a minor party has a greater likelihood of success.

outcomes through coalitions with the major parties". Mazmanian, *supra*, at 135.

Fusion can also benefit the major parties by making more likely the election of a candidate that both parties support. For example, in New York City, where registered Democrats outnumber registered Republicans by 5-1 (*see* New York State Board of Elections, *supra* note 10), Republican candidates have often succeeded by forming alliances with minor parties. This strategy has worked from the mid-1930s, when Fiorello LaGuardia used it, to the mid-1990s, when Rudolph Giuliani used it. *See* note 13, *infra*.

As a result, fusion balloting is a "significant electoral factor" in New York, as Minnesota concedes. (App. Br. at 4) Indeed, votes on the minor party lines, including the Conservative or Liberal line, have often provided the margin of victory for a candidate also nominated by one of the major parties.[12] For example:

- In New York City elections, there have been fusion candidacies since the 1930s, and the margin of victory has often been smaller than the total votes received on the minor party line. For example, Fiorello LaGuardia was elected Mayor of New York in 1937 and 1941 because he was the nominee of the Republican Party and various minor parties; John Lindsay became Mayor of New York in 1965 because he was nominated by both the Liberal and Republican Parties; and Rudolph Giuliani in 1993

[12] While it has been argued that, if not for fusion, some of the minor party voters may have supported the same candidate on the major party line, the minor party's endorsement may have affected enough voters' decisions to support that candidate to have made the difference. *See* Mazmanian, *supra*, at 121.

won the Mayor's office by a narrow margin because of votes on the Liberal Party line.[13]

- At the statewide level, the minor party vote in 1938 resulted in the election of Herbert Lehman as governor, even though Thomas Dewey's Republican total was greater than Lehman's Democratic total; the minor party vote in 1944 resulted in the election of Robert Wagner as United States senator; the Liberal Party vote in 1949 and in 1950 resulted in Herbert Lehman's election as United States senator; the Liberal Party vote was critical to the election of W. Averill Harriman as governor in 1954; Alfonse D'Amato won a Senate seat in 1980 and 1992 because of the votes he received on the Conservative Party line; and, George Pataki won the 1994 gubernatorial race because of votes on the Conservative Party line.[14]

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[13] In 1937, LaGuardia obtained 674,611 votes on the Republican line out of his total of 1,344,630 votes, while his opponent obtained 877,215 votes on the Democratic line (*The City of New York Official Directory 1940* 40 (1940)); in 1941, LaGuardia obtained 668,455 votes on the Republican line out of his total of 1,186,301 votes, while his opponent obtained 1,054,175 votes on the Democratic line (*The City of New York Official Directory 1942* 40 (1942)); in 1965, Lindsay got 867,310 votes on the Republican line and 281,796 votes on the Liberal line, as opposed to his Democratic opponent's 1,046,699 votes (*The City of New York Official Directory 1968* 29 (1968)); and in 1993 Giuliani got 867,767 votes on the Republican line and 62,469 on the Liberal line, as opposed to his Democratic opponent's 876,896 votes (*The Green Book 1994-1995: Official Directory of the City of New York* 4 (1995)).

[14] In 1938, Lehman received 1,971,307 votes on the Democratic line and 419,979 on the American Labor line, to Dewey's vote of 2,302,505 on the Republican line and 24,387 on the Independent Progressive line (*The New York Red Book 1940* 453 (M.C. Hutchins ed. 1940)); in 1944, Wagner received 2,485,735 votes on the Democratic line out of his total of 3,294,576, to his Republican opponent's 2,899,497 votes (*The New York Red Book 1945* 548 (J.S. Mearns ed. 1945)); in 1949, Lehman received 2,155,763 votes on the Democratic line and 426,675 votes on the Liberal line, as opposed to John Foster Dulles' 2,384,381 votes on the Republican line (*The New York Red Book 1950* 712 (J.S. Mearns ed. 1950)); in 1950, Lehman received 2,319,719 votes on the Democratic line and 312,594, on the Liberal line, as opposed to his Republican opponent's 2,367,353 votes (*The New York Red Book 1951* 734 (J.S. Mearns ed. 1951)); in 1954, Harriman received 2,296,645 votes on the Democratic line and 264,093 on the Liberal line, as opposed to his Republican opponent's 2,549,613 votes (*The New York Red Book 1955* 785 (M.D. Hartman ed. 1955)); in 1980, D'Amato received 2,272,082 votes on the Republican line, 275,100 votes on the Conservative line and 152,470 votes on the Right to Life line, as opposed to his Democratic opponent's 2,168,661 votes (*The New York Red Book 1981-1982* 1092 (G.A. Mitchell ed. 1982)); in 1992, D'Amato received 2,652,822 votes on the Republican line, 289,258 votes on the Conservative line and 224,914 votes on the Right to Life line, as opposed to his opponents' 2,943,001 votes on the Democratic line and 143,199 on the Liberal line (*The New York Red Book 1993-1994* 1044 (G.A. Mitchell ed. 1994)); and in 1994, Pataki received 2,156,057 votes on the Republican line and 328,605 votes on the Conservative line, as opposed to Mario Cuomo's 2,272,903 votes on the Democratic line and 92,001 votes on the Liberal line (*The New York Red Book 1995-1996* 868 (G.A. Mitchell ed. 1996)).

- New York's minor parties' influence in national elections is likewise compelling. Franklin D. Roosevelt carried New York in 1940 because of the American Labor line and he won New York in 1944 because of the Liberal Party line; votes on the Liberal Party line provided the margin of victory for John F. Kennedy in 1960; and votes on the Conservative Party line provided the margin of victory for Ronald Reagan over Jimmy Carter in 1980.[15]

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[15] In 1940, Roosevelt received 2,834,500 votes on the Democratic line and 417,418 on the American Labor line, as opposed to Wendell Willkie's 3,027,478 on the Republican line (*The New York Red Book 1941* 560 (1941)); in 1944 Roosevelt received 2,478,598 on the Democratic line, 496,405 on the American Labor line and 329,235 on the Liberal line, as opposed to Dewey's 2,987,647 on the Republican line (*The New York Red Book 1945* 546 (J.S. Mearns ed. 1945)); in 1960, Kennedy received 3,423,909 votes on the Democratic line and 406,176 votes on the Liberal line, as opposed to Richard Nixon's 3,446,419 votes on the Republican line (*The New York Red Book 1961-1962* 828 (M.D. Hartman ed. 1962));

B. A Fusion Ban Burdens Associational Rights of Political Parties and Voters.

1. A Fusion Ban Deprives a Party of Its Right to Select a Standard Bearer Who Best Represents Its Ideologies and Preferences.

A political party has a constitutional right to select "a standard bearer who best represents the party's ideologies and preferences". *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989); *see also id.* at 229-30. As described above (*see* pp. 6-7, *supra*), the Conservative and Liberal Parties have exercised this right either by nominating candidates on their own lines or, more frequently, by nominating fusion candidates.

Minnesota does not seriously dispute that a political party has a right to nominate its own standard bearer.[16] Instead, Minnesota argues that a minor party can exercise the right to "select" the candidate of another party, but that Minnesota can prohibit the identification of that candidate on the ballot "as the candidate of both parties" (App. Br. at 23); it argues that "[t]he New Party remains free to "*choose* . . . and to *endorse*" the standard bearer of its choice, but that "if the New Party *selects* someone who is already the candidate of another party, the candidate *cannot appear* on the general election ballot as

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in 1980, Reagan received 2,637,700 votes on the Republican line and 256,131 on the Conservative line, as opposed to Carter's 2,728,372 votes on the Democratic line (*The New York Red Book 1981-1982* 1086 (G.A. Mitchell ed. 1982)).

[16] It is unclear whether Minnesota has abandoned the argument that it made in the courts below that there is only a *de minimis* burden on the minor party if it cannot nominate the few candidates nominated by the major parties. (*See e.g.*, App. Br. at 36) Such a restriction is clearly an improper invasion of the minor party's autonomy prohibited by this Court's decision in *Eu*.

the candidate of both parties". (App. Br. at 23; emphasis added) Minnesota is wrong.

Party labels are informative to voters. (*See* pp. 8-9, *supra*) Minnesota's discrimination against minor parties cuts at a vital communication between the party and the voters.[17] The fusion ban will thus improperly have a substantial adverse effect on the minor party's electoral success. *See Riddell v. National Democratic Party*, 508 F.2d 770, 775 (5th Cir. 1975). Moreover, Minnesota would permit the major parties, but not the minor parties, to communicate by means of these labels; it would have the minor party, and not the major party, have an invisible standard bearer.[18] Minor parties that qualify to be on the ballot should have a right to communicate their choice of standard bearer on the ballot on the same terms as the major parties. *See Tashjian*, 479 U.S. at 214.

2. A Fusion Ban Is Not a Reasonable and Nondiscriminatory Restriction.

Minor parties have a right to compete for votes under electoral rules that do not impinge on them disproportionately. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). A fusion ban disproportionately burdens minor parties; it is not a reasonable, nondiscriminatory burden of the type that this Court has upheld.

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[17] We discuss below Minnesota's overexpansive reading of *Burdick v. Takushi*, 504 U.S. 428 (1992). (App. Br. 32-33) *See* p. 19, *infra*.

[18] Since Minnesota is not arguing that it is entitled to omit all party labels, we do not address the question whether a party could force the state, over its decision not to permit any party labels, to include party labels on the ballot.

First, Minnesota's ban is not reasonable in that it suppresses truthful information that is useful to voters. *See* Point I.B.1, *supra*.

Second, a fusion ban is discriminatory in several ways. A fusion ban, like Minnesota's, which prohibits cross-nomination, deprives the *minor party* of the ability to select the standard bearer of its choice if that standard bearer has already been nominated by a major party. The minor party rather than the major party will lose the candidate. Moreover, Minnesota's idea of a silent standard bearer—nominated but not identified on the ballot—likewise discriminates against minor parties because the major parties can use the party labels prohibited to the minor parties. Similarly, a fusion ban discriminates against minor parties by denying a separate ballot line even though they qualify for such a line. Contrary to Minnesota's repeated argument (App. Br. at 10), fusion candidacies do *not* "require[ ] the government affirmatively to enhance opportunities for exercise of First Amendment rights".[19] Once it has obtained the necessary support to get on the ballot, a minor party has the right afforded to all parties—the right to nominate its chosen standard bearer and to have a line on the ballot to communicate that nomination to voters.

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[19] Minnesota argues erroneously throughout its brief that this "case tests the extent to which states must frame their election laws, and their election ballots in particular, to maximize opportunities for minor political parties" (App. Br. at 8) and that the New Party "wants the State to reconfigure its ballot" by giving it "*another* ballot position for [the fusion] candidate so that it can demonstrate through the ballot the support it provided for that candidate". (App. Br. at 10) This case is not about "extending rights" or "reconfig[uring]" or "revising" or "altering the ballot" in order to "maximize [political] opportunities" for minor parties (App. Br. at 8, 10, 26, 31-35) or about single-issue advertising on the ballot (App. Br. at 10, 35); it is about unreasonable discrimination against minor parties.

3. A Fusion Ban Violates the Right to an Effective Franchise.

Fusion in New York has increased the effectiveness of the franchise—among other things, it has permitted political parties like the Conservative and Liberal Parties to compete in a way that would be impossible without fusion; it has increased competition in the marketplace of ideas and has increased options to voters; and it has been the deciding factor in many important races. *See* Section I.A, *supra*. Fusion has thus advanced the interest of "like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences". *See Norman*, 502 U.S. at 288.

We do not attempt here to define the precise contours of political parties' and voters' associational rights to an effective franchise. Rather, we respond to Minnesota's repeated argument that permitting fusion candidates on the ballot is equivalent to a protest vote for Donald Duck. (*See* App. Br. at 10, 32-33) It is not.

A vote for a Conservative or Liberal Party fusion candidate cannot be compared to registering a "protest vote" or "a means of giving vent to 'short-range political goals, pique or personal quarrel'". *Burdick*, 504 U.S. at 438 (citation omitted). This Court did not hold in *Burdick* that the vote for candidates on the ballot has no "expressive" function. Election results do send a message; that is one of their functions. Fusion, unlike a protest vote for Donald Duck, serves to enhance the ability to speak and hear that message; it improves the effectiveness of the franchise. *See* Section I.A, *supra*.

II. MINNESOTA DOES NOT OFFER A SIGNIFICANT, MUCH LESS A COMPELLING, STATE INTEREST IN BANNING FUSION.

A. Fusion Has Not Confused Voters.

Minnesota claims that a "fusion ban reduces voter confusion by keeping the ballot simple". (App. Br. at 41) Minnesota is wrong.

Minnesota underestimates the capabilities of the electorate; this Court's cases reflect a "greater faith in the ability of individual voters to inform themselves about campaign issues." *Anderson*, 460 U.S. at 797. Minnesota's alleged efforts to prevent voter confusion should be viewed with additional skepticism because Minnesota is reducing the information available to voters. *Id.* at 798. This is especially so because, as described above (*see* pp. 17-18, *supra*), Minnesota actually suppresses truthful and useful information about the fact that a minor party has nominated a fusion candidate.

In any event, New York's experience with fusion refutes Minnesota's speculation. New York's ballot is complex because voters must make decisions about numerous issues and candidates at each election. A fusion ban will not make these decisions "simple", especially if Minnesota is correct in its argument that a fusion ban will result in more candidates on the ballot. (App. Br. at 44)[20]

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[20] Minnesota argues that both fusion *and* a fusion ban would produce a lengthy ballot full of candidates; it asserts both that "[f]usion invites the development of large and more complex ballots" (App. Br. at 42) and that a fusion ban "encourages minor parties to present candidates for election who may have been overlooked by the major parties". (App. Br. at 44)

In fact, fusion is informative, not confusing. (*See* pp. 8-10, *supra*)[21] Contrary to Minnesota's reference to an ambiguous comment in a nearly forty-year-old article about elections over fifty years ago (App. Br. 43),[22] there is not a shred of evidence suggesting that fusion has confused New York voters. Indeed, New York election returns reveal a pattern of sophisticated, not confused, voting behavior. Where fusion candidates appear on the ballot, voters in New York do not consistently cast their votes along a single party line. For example, in 1970, the Liberal and Republican parties both nominated Charles Goodell for U.S. Senate and Nelson Rockefeller for Governor. The voters split their tickets; Rockefeller won, but Goodell lost.[23]

In the absence of any facts to demonstrate voter confusion in New York, Minnesota argues that candidates may promote fusion candidacies for a variety of mischievous motives,

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[21] There is no reason to think voters would be any less sophisticated in Minnesota. Political scientists have recognized that, since being confronted with "wedge issues" of the late 1960s and early 1970s, voters have evaluated candidates with increasing sophistication. *See, e.g.*, Theodore Lowi, *The Party Crasher*, N.Y. Times Magazine, August 23, 1992, at 28, 28, 33.

[22] Minnesota cites (App. Br. at 43) a comment in a 1957 law review article about the election of Fiorello LaGuardia that LaGuardia's multiple parties presented a "somewhat confusing picture". No voter was confused about the party lines of the Little Flower, who was more famous than several of the parties who nominated him. Indeed, in the next mayoral election, LaGuardia's successor on the ticket of the three parties lost by a three-to-one margin. *The City of New York Official Directory 1948* 42 (1948) (Jonah Goldstein, running on three parties' tickets, lost 3 to 1 to William O'Dwyer).

[23] Goodell received 1,178,679 Republican votes, while the Conservative Party candidate, James E. Buckley, received 2,179,640 votes. *The New York Red Book 1971-1972* 1028 (M.D. Hartman ed. 1972). In the Governor's race, Rockefeller received 3,105,220 Republican votes. *Id.* at 1023.

including a desire to win voter attention and associate with popular party slogans, thereby increasing dramatically the number of candidate names on the ballot. (App. Br. at 42-43) However, the experience of Liberal and Conservative Parties in New York demonstrates that Minnesota's wholly speculative concerns are simply unfounded: such "laundry list" ballots have not happened in New York. Nor do those concerns justify a fusion ban; general ballot access requirements adequately limit the number of candidates and parties eligible to be placed on the ballot. *See* N.Y. Elec. § 1-104(3) (McKinney 1978 & Supp. 1996).

B. Fusion Has Promoted Electoral Competition Between Opposing Candidates.

Minnesota argues that fusion suppresses candidate competition by using up "limited space on the general election ballot" because, Minnesota speculates, each candidate is cross-nominated by many parties, thereby giving the appearance that all candidates represent similar positions. (App. Br. at 44-45) Minnesota is wrong.[24]

The experience in New York is quite the opposite.[25] Fusion increases competition in the marketplace of ideas; it forces candidates to refine their positions on key election issues, thereby shedding light on the issues on which opposing candidates differ. *See* p. 9, *supra*. This refinement

[24] As noted above, the state's interest in limiting the number of candidates appearing on a ballot, or preventing the ballot from becoming a "laundry list" of candidates, is already served by separate ballot access provisions. *See* p. 7, *supra*. New York has not used up the allegedly "limited space" of the ballot. And, given this concern with limited ballot space, it is also illogical that Minnesota suggests that minor parties should nominate their "own" candidates (instead of forming a coalition). (*See* App. Br. at 44-45)

[25] Political scientists rank New York as a very competitive electoral state. *See, e.g.*, Mulcahy and Katz, *supra* note 10, at 57.

draws candidates out of the center where their positions tend to merge together, thereby enhancing the competition between them. Moreover, because voter participation has typically been higher in contested races, it is often in those close contests that the votes received on the minor party line make the difference in the outcome. Thus, the Eighth Circuit below recognized that, rather than frustrate competition, fusion may actually "invigorate" competition. *Twin Cities Area New Party*, 73 F.3d at 199.[26]

C. Fusion Has Not Promoted Party Raiding.

Minnesota asserts that fusion leads to party "raiding." (App. Br. at 45)[27] Again, Minnesota's fears are belied by New York's experience.

Because fusion cannot occur in New York without the consent of the party of which the candidate is not a member (*see* note 2, *supra*), party raiding by multiple nomination is impossible. Minnesota's reliance on *Zuckman v. Donahue*, 79 N.Y.S.2d 169 (N.Y. Sup. Ct.), *aff'd*, 80 N.E.2d 698 (3d Dep't 1948) (App. Br. at 45), is misplaced. *Zuckman* concerned a group of voters who set out to "seize control" of the American Labor Party precisely because the group was unsympathetic to the party's platform. *Id.* at 701. The court held that "[e]nrollment and attempted seizure of party

[26] This conclusion is supported by data that demonstrate that a voter whose preference for a candidate is driven by the candidate's position on issues—a preference facilitated by fusion—is more likely to vote than is a voter whose preference is driven by the candidate's party affiliation. Nie et al., *supra*, at 169-70.

[27] Minnesota also claims that a minor party's nomination of a major party candidate "simply to gain the status of a major party" is somehow impermissible. (App. Br. at 45) Minnesota offers no support for this position. That is not surprising since Minnesota is in effect arguing that the voters should not be permitted to vote on whether they wish the minor party to gain such status on the ballot.

machinery for the purpose of advancing the fortunes of another political party will not be tolerated." *Id.* at 700. What *Zuckman* prohibits, therefore, is a one-sided coup attempt born out of unsympathetic motives.[28] Fusion presents an entirely different situation; fusion is consensual, and it benefits both parties. *See* Mazmanian, *supra*, at 118-19.

D. Fusion Has Not Splintered the Major Parties.

Minnesota claims that fusion causes party splintering. (App. Br. at 46-50)[29] Minnesota is wrong.

Decades of actual experience with fusion in New York show that fusion has not compromised the distinct identities of the various parties. The Liberal Party has been in existence since 1944, the Conservative Party since 1962. Throughout the existence of both parties, fusion has been permitted, and

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[28] The "not in sympathy" language in *Zuckman* reflects the spirit of New York's anti-raiding law, passed one year before in Chapter 432 of Election Laws of 1947. *Cornett v. Sheldon*, 894 F. Supp. 715 (S.D.N.Y. 1995). That law, known as the "Wilson-Pakula" law, is now codified as N.Y. Elec. Law §6-120(3) (McKinney 1978 & Supp. 1996) (requiring consent of a party's executive committee to nominate as a candidate one who is not a member of that party). Significantly, as was stated in *Werbel v. Gernstein*, 78 N.Y.S.2d 440 (N.Y. Sup. Ct.), *aff'd*, 78 N.Y.S.2d 926 (2d Dep't 1948), the purpose of the anti-raiding law is to prevent membership in a party *by those not in sympathy* with the party. The consent requirement thus ensures that fusion candidates are in sympathy with the party whose nomination they seek. In fact, in *Clark v. Rose*, 379 F. Supp. 73 (S.D.N.Y. 1974), *aff'd*, 531 F.2d 56 (2d Cir. 1976), the constitutionality of the consent requirement of the Wilson-Pakula law was upheld. The court reasoned that "New York, by enacting the statute, therefore, has reasonably sought to allow fusion tickets where desired without subjecting its political parties and their members to the debilitating effects of voter confusion and usurpation of the party organizations." *Id.* at 78.

[29] Minnesota claims that party splintering may occur if one party's various factions each nominate the same major-party candidate under different "ballot slogans" on the general election ballot. (App. Br. at 47)

both parties have engaged in fusion on a regular basis. Nonetheless, neither party has lost its distinct identity. *See* Mazmanian, *supra*, at 132. Nor have the Republican or Democratic Party lost *their* distinct identity in the face of competition from the minor parties. For example, it is difficult to assert credibly that the Republican Party was irrevocably splintered into issue-based factions because Rudolph Giuliani was also nominated by the Liberal Party, or that it was splintered when Alfonse D'Amato was also nominated by the Conservative Party. In fact, because fusion forces candidates and parties to refine their positions on issues, fusion actually *enhances* the distinctness of the major parties.[30]

CONCLUSION

Fusion is a critical aspect of core associational rights of both political parties and voters. Moreover, Minnesota has not demonstrated any state interest sufficiently weighty, or sufficiently limited to its alleged interest, to justify the burden on those rights. *Amici* therefore respectfully urge this Court

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[30] Fusion does not affect the possibility of party splintering in any way. "The state interest in avoiding the danger of candidate-based factionalism is furthered by disaffiliation requirements, but is irrelevant to fusion bans." Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, *supra* note 5, at 1326. Indeed, party splintering has not occurred in New York even though New York election laws do not require consent of the "home" party, *i.e.* the party of which the candidate is a member (which is virtually always the major party).

to affirm the Eighth Circuit's ruling that Minnesota may not constitutionally ban fusion.

August 30, 1996

Respectfully submitted,

RORY O. MILLSON
CRAVATH, SWAINE & MOORE
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

(11)

No. 95-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and JOAN ANDERSON GROWE, Secretary of the State of Minnesota,
Petitioners,

v.

TWIN CITIES AREA NEW PARTY,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF *AMICI CURIAE* OF TWELVE UNIVERSITY PROFESSORS AND CENTER FOR A NEW DEMOCRACY IN SUPPORT OF RESPONDENT TWIN CITIES AREA NEW PARTY

DAVID HALPERIN
Counsel of Record
2027 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 328-2232

Counsel for *Amici Curiae*

August 30, 1996

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STATEMENT OF INTEREST

Amici are twelve university professors who have an interest in this matter as students and teachers of the history and dynamics of the American political system; and the Center for a New Democracy, a Washington, D.C.-based non-profit organization that provides support services to grassroots efforts to reform campaign laws. *Amici* submit this brief in support of the respondent, the Twin Cities Area New Party, and urge this Court to affirm the Eighth Circuit's judgment that Minnesota's law banning electoral "fusion," or multiparty nomination, places a constitutionally impermissible burden on the rights of minor political parties.

The individual writings of *amici* professors have been cited by each side to this dispute, *see* Petitioners' Br. at 27; Respondent's Br., and by the Court of Appeals below, Cert. Pet. App. 4. *Amici* seek to assist the Court, as it decides this important case concerning the rights of political parties and voters, by explaining the history of fusion and anti-fusion laws. The professors joining this brief are:

- Peter Argersinger, Presidential Research Professor of History, University of Maryland, Baltimore County;
- Dale Baum, Associate Professor of History, Texas A&M University;
- Walter Dean Burnham, Frank C. Erwin Junior Centennial Chair, Professor of Government, University of Texas;
- Colin Gordon, Associate Professor of History, University of Iowa;
- Ira Katznelson, Ruggles Professor of Political Science, Columbia University;
- Michael Kazin, Professor of History, American University;
- Paul Kleppner, Distinguished Research Professor of History and Political Science, Northern Illinois University;
- J. Morgan Kousser, Professor of History and Social Science, California Institute of Technology;

- Theodore Lowi, John L. Senior Professor of American Institutions, Cornell University;
- Jeffrey Ostler, Assistant Professor of History, University of Oregon;
- Daniel Mazmanian, Director of the Center for Politics and Economics, Luther J. Lee Professor of Government, Claremont Graduate School; and
- Richard Valelly, Professor of History, Swarthmore College.

SUMMARY OF ARGUMENT

In evaluating constitutional challenges to state election laws, this Court has weighed the nature and magnitude of the asserted injury to the plaintiff's rights, the interests identified by the state, and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 435 (1992). The research and expertise of *amici* professors bear specifically on three issues relevant to the Court's inquiry in this case: (1) the motives behind state anti-fusion laws; (2) the electoral consequences of those laws, including the injury to minor parties like the Twin Cities Area New Party; and (3) the validity of the asserted state interests in maintaining those laws today.

As to each issue, the historical record is unequivocal. State legislatures passed anti-fusion laws in the late nineteenth and early twentieth century on strictly partisan grounds and with clear animus toward the political participation of minor parties and their supporters. In the short term, state anti-fusion laws undermined the political influence of prominent minor parties; in the longer term, anti-fusion laws, in concert with other changes in electoral laws, not only threatened the viability of minor political parties but also contributed to the slow collapse of the high voter turnout and issue-driven electoral competition that marked late nineteenth century American politics. Finally, the historical evidence is

completely at odds with the State's claim that electoral fusion would invite harmful political instability and voter confusion. Indeed, there is ample evidence -- in the experience of both those states which have banned fusion and in those which have maintained the practice -- that the fusion option yields more meaningful political competition and a better-informed electorate.

ARGUMENT

I. LAWS BANNING FUSION CANDIDACIES WERE PURELY PARTISAN EFFORTS TO STRENGTHEN DOMINANT PARTIES AND DESTROY MINOR PARTIES

In Part III, *infra*, *amici* argue that the historical record renders invalid the State's proffered interests in its anti-fusion law. The reason for the poor fit between the law and these state interests is illuminated in this Part, in which we provide evidence that the actual motivations for anti-fusion laws had little, if anything, to do with any legitimate interest now identified by the state. Instead, these laws were propelled by the desire of ruling political parties to squelch the aspirations of budding political parties and their supporters. Such self-serving and anti-democratic purposes call into question the legitimacy of anti-fusion laws. *Cf. Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 812-13 (1985) (remanding First Amendment challenge to exclusion of advocacy group from federal charity drive to consider whether the exclusion was "impermissibly motivated by a desire to suppress a particular point of view"); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (striking down challenged state tax as violative of First Amendment because it appeared aimed at reducing circulation of newspapers that were critical of the state government).

Electoral fusion was a staple of late nineteenth century politics in the United States. It was practiced most commonly

in the Midwest and West as a means of forging electoral alliances between various minor parties and the Democratic Party, which was then the weaker of the two major parties in these regions. Multiple party nomination "helped to maintain a significant third party tradition by guaranteeing that dissenters' votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard." P. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 American Historical Review, 287, 288-289 (1980). In the intensely partisan electoral atmosphere of the late nineteenth century, minor parties represented a "critically important proportion of the electorate," and the fusion option became a mechanism for providing representation for this significant bloc of voters. *Id.*, at 289.

In the West and Midwest of the late nineteenth century, as in fusion's most important modern foothold, New York State, fusion enhanced political participation by allowing minor parties to maintain bailot status, enabling minor party supporters to escape the "wasted vote" dilemma of winner-take-all elections, and giving voters the opportunity of supporting a major party's candidate without supporting the candidate's party. *See* H. Scarrow, *Parties, Elections, and Representation in the State of New York* 56 (1983); D. Mazmanian, *Third Parties in Presidential Elections* 115-135 (1974); Argersinger, *A Place*, at 303-306.

A. Anti-Fusion Laws Were Part of a Package of "Reforms" Aimed at Weakening Opponents of a State's Governing Party

Anti-fusion laws were a key component of a general "reform" movement of the late nineteenth and early twentieth century, a movement aimed at weakening the opposition to dominant political forces. The suffrage and ballot access restrictions in the post-Civil War South were simply the most egregious example of a national pattern in which the pursuit

of "good government" often masked concerted efforts to constrain politics along racial, class, and partisan lines. *See* Hays, *The Politics of Reform in Municipal Governments in the Progressive Era*, 55 Pacific Northwest Quarterly 157-169 (1965); M. Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910*, 250-265 (1974); F.F. Piven & R. Cloward, *Why Americans Don't Vote* 85-95 (1988).

Legislative prohibition of fusion accompanied a wide array of "reforms" designed in large measure to ensconce the ruling party. These provisions ranged from periodic voter registration requirements, runoff primaries in the South, and institution of the Australian ballot (uniform state-printed ballots that replaced the ballots traditionally distributed by political parties), to more obvious efforts to restrict voting such as literacy tests, poll taxes and residency requirements. All of these developments had the effect -- and often the intent -- of disenfranchising voters of ordinary means, handicapping opposition parties, quelling dissent, and narrowing partisan competition.

While the scope and variety of these restrictions make it difficult to isolate the consequences of any single innovation, placing anti-fusion laws in this context does underscore the broader motives and goals of their sponsors. Throughout the Midwest, for example, Republican legislators abused the introduction of the Australian ballot to constrain ballot access. While state responsibility for printing ballots enhanced the integrity of the election process, there was a darker side: Those in power were able to juggle the form of the ballot in such a way as to bar multiple endorsements -- "a scheme," as one Nebraska judge noted, "to put voters in a straightjacket." Argersinger, *A Place*, at 292. Thus in Minnesota, a Republican Secretary of State used the introduction of the Australian ballot in 1892 to block the fusion option, deciding, although the new ballot rules were silent on the question, that candidates' names could appear only once. Democratic fears that this restriction would cost them upwards of 20,000 votes

proved accurate. The next election was dominated by the Republicans. *Id.* at 295. This dominance was entrenched by the enactment of an explicit ban on fusion in 1901.

B. The Partisan Motives Behind Anti-Fusion Laws Were Obvious

Examination of the intent behind state anti-fusion laws not only illuminates the motives of historical actors, but also compels careful scrutiny of the interests of states like Minnesota in maintaining these laws. The historical record shows that changes such as anti-fusion laws were partisan measures aimed squarely at destroying the political aspirations of minor parties. Which major party led the charge in each region depended on which party in that region was dominant and thus able to enact barriers to the success of political competitors. "Government officials are not only agents of the state, but also partisan politicians. Democrats and Republicans have been able to use the authority of the state indirectly to handicap if not eliminate the opposition." Mazmanian, *supra*, at 90.

In the Democrat-dominated South, state legislatures systematically erected suffrage and ballot access restrictions after 1890. The intent and consequences of these restrictions were both to disenfranchise African-Americans and, just as importantly, to solidify one-party rule against inroads by Republicans or Populists. *See* Kousser, *supra,* at 5-9 & *passim.*

In the Republican-dominated northern United States, especially the Midwest, legislators used anti-fusion statutes to solidify their control of statehouses and electoral votes. "The Republicans' partisan motivation was transparent and repeatedly, if inadvertently, confessed." Argersinger, *To Disenfranchise the People: The Iowa Ballot Law and the Election of 1897*, 63 Mid-America 18, 22 (1981). In this region of the country, anti-fusion laws were passed along nearly perfect partisan lines -- supported by Republicans,

opposed by Democrats and others -- and they spread as the Republicans captured statehouses after 1890. In state after state, efforts to manipulate ballot laws to prevent electoral fusion were "intended to promote the dissolution of party ties while giving Republicans the residual benefits of them." Argersinger, *A Place*, at 292. As a Michigan Republican admitted: "We don't propose to allow the Democrats to make allies of the Populists, Prohibitionists or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation." *Id.* at 296. In Iowa, the Republicans feared that their partisan motives were so obvious as to spark an electoral backlash, and one Populist wondered bitterly why the ban "did not go on a little further and say there shall be but one ticket allowed on the ballot and that must be the Republican ticket." Argersinger, *To Disenfranchise the People*, at 23.

II. FUSION BANS HAVE HELPED DESTROY MINOR PARTIES AND REDUCE VOTER PARTICIPATION

Anti-fusion laws clearly played an important role in the creation of the electoral "system of 1896," the name given by Schattschneider, *The Semisovereign People* 78-85 (1960), to the pattern of electoral politics ushered in by the defeat of the Populist Party in the 1896 elections. This system was marked by a sharp decline in partisan competition and identification; the strengthening of regional party monopolies (Democrats in the South, Republicans in the North); increases in institutional barriers to minority party competition; and the beginning of a steady downturn in voter turnout.

Amici do not claim that anti-fusion laws were the only or even the primary force behind the "system of 1896." It is difficult, in assessing either short- or long-term consequences, to isolate anti-fusion laws from the larger bundle of restrictions on suffrage and ballot access, most of which were enacted at very nearly the same time, some of which (poll

taxes, literacy tests, onerous residency requirements) are no longer on the books, and some of which (the Australian ballot, personal registration requirements, runoff elections) persist. And it is difficult to attribute national trends (such as barriers to third parties and declining turnout) to a legislative pattern which varied considerably from state to state and region to region.

However, weighing all of the historical evidence, *amici* believe that fusion bans were critically important in many states and, overall, no less important than other similar means to the same end. As noted above, the institution of the Australian ballot gave those in power the opportunity and mechanism by which to introduce fusion bans. This mechanism, together with express anti-fusion laws, magnified the effect of "first-past-the-post" or winner-take-all elections by erasing any electoral rewards for minor party activity.

While scholars may disagree over the causal importance of various aspects of the "system of 1896," most agree that institutional "reforms," the collapse of party competition, the entrenchment of an oligarchic two-party system, and the decline in voter turnout were mutually reinforcing -- and mutually destructive. *See, e.g.*, Burnham, "The System of 1896: An Analysis," in P. Kleppner, ed., *The Evolution of American Electoral Systems* 152-165 (1981). People ceased to vote as their electoral options narrowed or lost meaning. "Mobilization of the mass electorate has always been, and still remains, contingent on the existence and vitality of political parties." P. Kleppner, *Who Voted? The Dynamics of Electoral Turnout, 1870-1980* 27 (1982). Thus, while anti-fusion laws undermined the *existence* of minor parties -- which found ballot access much harder to maintain -- they also undermined the *vitality* of major parties, which faced less competition and increasingly stood for nothing but election. *Id.* at 56-57.

A. Fusion Has Proved Necessary to the Endurance of Minor Parties

In assessing the impact of anti-fusion laws on the fate of minor parties, we can offer two types of evidence: (1) the rapid demise of the Populist Party in the wake of the late nineteenth century fusion bans; and (2) the relative success of minor parties in electoral settings where fusion was not banned, as in New York. Indeed, two extensive studies of the third party experience conclude that ballot access restrictions such as fusion bans have devastated minor parties by magnifying the winner-take-all logic of American politics, and that the fusion option is integral to the viability and success of minor parties. Mazmanian, *supra*, at 119; S. Rosenstone, et al., *Third Parties in America: Citizen Response to Major Party Failure* 16-25 (1984).

Suffrage restrictions wiped out the Populist Party, which had emerged in 1891 and acquired strong labor and farmer support with its commitment to a tax on income, public ownership of utilities, and free coinage of gold and silver. In every setting in which the Populists threatened success, the party in power (Democrats in the South, Republicans in the Midwest) moved to narrow the electorate and erect barriers to effective opposition. In the election of 1896, William Jennings Bryan, the Populist-Democratic Presidential candidate, stumbled badly in anti-fusion states and did well where the practice was still legal and common. Indeed, the election was so instructive that Republican legislatures hurriedly passed anti-fusion laws in Illinois, Indiana, Iowa, North Dakota, Pennsylvania, Wisconsin, and Wyoming in 1897; in California and Nebraska in 1899; in Kansas, Minnesota, and South Dakota in 1901; in Idaho in 1903; and in Montana in 1907. Argersinger, *A Place*, at 301-02.

Invariably, the fusion ban forced Populist leaders and voters to choose between the quixotic protest represented by the separate Populist ballot line and uncomfortable support of

a major party candidate. In Iowa (and elsewhere) the latter choice cost the Populist Party its ballot access in the first election after the ban was passed. Argersinger, *To Disenfranchise the People*, at 32-33. The anti-fusion law "practically disenfranchises every citizen who does not happen to be a member of the party in power," lamented one Populist. ". . . They are thus compelled to lose their vote (as that expression is usually understood) or else unite in one organization. It could mean that there could only be two parties at one time." Argersinger, *A Place*, at 304.

While fusion bans destroyed minor parties in the late nineteenth century, the absence of such prohibitions -- most importantly in New York State -- has enabled minor parties to thrive. In New York, a strong and stable tradition of multiple party nomination, on separate ballot lines, has sustained four important minor parties: the American Labor Party, the Conservative Party, the Liberal Party, and the Right to Life Party. By offering or withdrawing their support of major party candidates, these parties, which now claim over 20 percent of New York's registered voters, have not only wielded important and often decisive power but have contributed to a diverse and competitive political culture.

As the New York experience indicates, the fusion option is essential to the long-term survival of minor parties in the United States. It is the means by which minor parties can escape the dismal choice between wasting their supporters' votes and disappearing into one of the two major parties. Mazmanian, *supra*, at 117-124; Kirschner, Note, *Fusion and the Associational Rights of Minor Parties*, 95 Columbia Law Review 683, 684, 702 (1995); Scarrow, *supra*, at 56.

While third parties have occasionally cropped up outside of New York State, they have not shown great durability or stability. Minor party successes in anti-fusion jurisdictions have been either exceptional responses to exceptional circumstances, or ephemeral, candidate-centered national campaigns. The success of Minnesota's Farmer-Labor Party through the inter-war years, followed by the party's 1944

merger with the state Democratic Party, suggests that while anti-fusion laws are not an absolute barrier to successful third-party politics, their central tendency is to preclude third parties as durable and effective independent associations. R. Valelly, *Radicalism in the States: The Minnesota Farmer-Labor Party and the American Political Economy* (1989); Mazmanian, *supra*, at 27, 120; Penniman, "Presidential Third Parties and the Modern American Two-Party System," in W. Crotty, ed., *The Party Symbol* 101-117 (1980).

B. Fusion Bans Have Correlated With Lower Voter Turnout

The first and foremost casualty of a less competitive political system was voter turnout. "The coalitional arrangements created by the 'System of 1896,' eroded the older linkages among group subcultures, partisan identification, and turnout rates.... [T]hat displacement resulted in a steep drop in the rate at which newly eligible voters were inducted into the active electorate, and a corresponding level of decay in the general turnout." Kleppner, *supra*, at 53. From historic highs of nearly 80 percent in the 1880s, voter turnout has plummeted to barely 50 percent in presidential elections, with almost half of that decline concentrated in the first decade after 1896. The "drop-off" in off-year elections has risen even more sharply: In the 1880s almost 65 percent voted in such contests, but by the 1980s barely 30 percent turned out. *See* Burnham, *The Changing Shape of the American Political Universe*, 59 American Political Science Review, 7, 10 (1965); Kleppner, *supra*, 112, 113; R. Scammon & A. McGillivray, eds., *America Votes* 1, 13 (1995). Again, it is not easy to unravel the specific causal effect of anti-fusion statutes in assessing national or long-term trends. But the evidence that fusion bans contribute to a decline in voter turnout, both in the wake of the Midwestern fusion bans and in a fusion setting such as New York, is compelling.

As fusion bans forced Midwestern Populists to choose between the Democrats and Republicans, many simply avoided the polling place entirely. This response was exacerbated by the fierce partisan loyalties of the late nineteenth century, the widespread association of Republicans with banking and railroad trusts, and the persistent association of the Democratic Party with the "bloody shirt" of the Civil War. In the aftermath of their state's fusion ban, "a sizable minority" of Kansas Populists dropped out of the electorate. Argersinger, *A Place*, at 303. South Dakota witnessed "a huge increase" in non-voters after its fusion ban. *Id.* Many Iowa Populists, left "confused and discouraged" by a fusion ban, either spoiled their newly-restrictive ballots (in protest or in error) or simply declined to vote. *See* Argersinger, *To Disenfranchise the People*, at 32-33.

By contrast, states which continued to allow fusion boasted relatively healthy levels of party competition and voter turnout. Again New York State, the setting in which fusion has been widely practiced, offers a striking example. New York has historically been the most competitive electoral arena in the country, measured by the vote margin between the winning candidate and the nearest opponent. *See* P. David, *Party Strength in the United States* (1972). And New York has historically outpaced national rates of voter turnout. *See* Scarrow, *supra*, at Appendix II, 94-95.[1]

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[1] While New York State's politics have remained uniquely competitive since 1970, turnout has slipped to echo the national average. This trend reflects both the dramatic national collapse in voter turnout (which fell from the 60-65 percent range in the 1960s to barely 50 percent by the end of the 1970s) and public despair over New York's pervasive fiscal crisis. Despite the decline in turnout, minor parties have retained their critical importance: In the most recent statewide election, in 1994, George Pataki won the gubernatorial race with a plurality of 174,000 votes while counting 329,000 votes on the ballot line of the Conservative Party and another 54,000 votes as the "Tax Cut Now" candidate. *See* Scammon & McGillivray, *supra*, at 13, 323, 332.

III. THE INTERESTS IDENTIFIED BY THE STATE ARE NOT CONSISTENT WITH HISTORICAL EXPERIENCE OR CORE PRINCIPLES OF OUR POLITICAL SYSTEM

Finally, *amici* consider the interests cited by the State in support of maintaining its fusion ban. The State argues that such bans are needed to protect the stability of the electoral system and to protect voters from confusion. As discussed in Part I, *supra*, these claims are not supported by the historical evidence. Such motives had little to do with the passage of anti-fusion laws, which were narrowly partisan tactics aimed at disabling minor parties and disenfranchising their supporters. Not surprisingly, expressed concern for "political stability" crops up in the historical record as well, but political historians now widely recognize such sentiments as a smoke screen for partisan politics and a mistrust of working class voters, especially African-Americans in the South and recent immigrants in the urban North. *See* Hays, *supra* at 157-169; Kousser, *supra*, at 250-265; Piven & Cloward, *supra*, at 85-95. *Cf. Wallace v. Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring) (in the Establishment Clause context, "a law will not pass constitutional muster if the ... purpose articulated by the legislature is merely a 'sham'").

A. The "Political Stability" Theory Touted By the State Overstates Greatly the Risks and Ignores the Benefits of Wider Electoral Competition

The State's view of what a "stable" political system should look like -- a two party system in which alliances and compromises are struck within the major parties -- is questioned by many political scientists and political historians. In a nation as vast and diverse as the United States, two parties cannot pretend to consistently represent the interests of the public. In part as a way of avoiding this programmatic

challenge, American politics has evolved around interests rather than ideas, the patronage-fueled party politics of the nineteenth century giving way to the service-oriented "interest-group liberalism" of the modern era. Sustained programmatic competition has rarely been necessary. Disenfranchisement narrowed the focus of both parties, and national two-party competition not only discouraged third parties but also disguised a pattern of essentially non-competitive one-party rule in local and regional politics.

In a two-parties-only system, both parties crowd to the political center. Where the political climate is characterized by hurdles to registration and ballot access, the systematic influence of powerful economic interests, and mass abstention by people of ordinary means, the parties are even less willing to offer distinct programmatic choices, let alone mobilize voters around those choices. *See* E.E. Schattschneider, *Party Government* 65-98 (1942).

Thus, a two-party system that actively hinders minor parties tends to discourage meaningful electoral competition between issue-oriented political parties. The vitality of political competition in the late nineteenth century nurtured high levels of voter interest and turnout, just as the collapse of such competition, reflecting fusion bans and other reforms, caused turnout and interest to plummet after 1896. Burnham, *The Changing Shape*, at 7-28. We cannot argue too strongly the importance of sustaining healthy electoral competition, and the importance of minor parties in breaking the programmatic deadlock of two-party politics. The fusion option is crucial in this respect. Fusion, as both the nineteenth century and New York experiences underscore, forces major parties to take programmatic stands, widens the options available to voters, and encourages competition among parties rather than merely within them. *See* Kirschner, *supra*, at 711.

Furthermore, the State's fears of factionalism and minority rule are misplaced. Indeed, it is not fusion but *bans on fusion* that often encourage factionalism, as minor parties -

- without prospect of electoral rewards -- become mere protest vehicles. Kirschner, *supra*, at 706; Mazmanian, *supra*, at 68-69. Nor does fusion upset the essential majoritarian and winner-take-all character of United States politics. In a system permitting fusion, a *candidate* must still assemble a majority or plurality of voters in order to win, even if the *parties* nominating the candidate do not.

Indeed, the few historical instances under which fusion *has* threatened electoral stability merely suggest the importance of establishing some basic ground rules. Prohibiting the fusion of two major parties would avoid, for example, the anti-partisan implications of California's 1911-1954 major party cross-filing system. *See* Pitchell, *The Electoral System and Voting Behavior: The Case of California's Cross-Filing*, 12 Western Political Quarterly 459, 462-64 (1959); Mazmanian, *supra*, at 133. And requiring consent of the candidate and simple ballot thresholds, as the New York experience demonstrates, avoids the complications of involuntary fusion, as sometimes occurred prior to the institution of the Australian ballot, or "laundry list" ballot lines. Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 Harvard Law Review 1302, 1331-1333 (1996); Mazmanian, *supra*, at 118; Scarrow, *supra*, at 56-57; Argersinger, *A Place*, at 290.

"[A] review of the [fusion] experience suggests that its practice almost certainly helps to promote rather than undermine democratic stability, not least by providing the public with confidence that the electoral system was not being deliberately rigged against major dissenting streams of public sentiment." Declaration of Walter Dean Burnham, para. 13, Joint Appendix 17. *Amici* strongly agree with the Eighth Circuit that "rather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics." Cert. Pet. App. 7.

B. The Historical Record Undermines the State's Claim That Fusion Causes "Voter Confusion"

There is also no evidence, in either the historical experience of nineteenth century fusion or the contemporary experience of fusion states like New York, that the practice confuses voters. *See* Burnham Declaration, para. 13, Joint Appendix at 17. Indeed, the ephemeral nature of minor parties in an anti-fusion atmosphere is far more likely to confuse the electorate. Where fusion is allowed, minor party presence stabilizes and clarifies electoral competition; third parties are not confined to fleeting, divisive issues or candidate-centered politics. Mazmanian, *supra*, at 120, 152.

Consider the experience of Midwestern states before the fusion bans of the 1890s. It was the peculiarly partisan manipulation of the new Australian ballot which bewildered voters, as Republicans used the new ballot form to render a familiar practice confusing and difficult. Argersinger, *A Place*, at 297-298. With the introduction of new ballot forms and restrictions, voters -- and especially Populist voters -- were left "confused and discouraged" by their narrowed electoral options. Argersinger, *To Disenfranchise the People*, at 32-33.

Compare that result with the modern experience of New York State. As we argue above, the New York system protects the identity of political parties, encourages them to make programmatic appeals to voters, and enables voters to make clear and meaningful choices between candidates and between parties. Scarrow, *supra*, at 9-18. Fiorello La Guardia, who ran on no less than nine different party lines in his political career, maintained a distinct political identity. His mayoral victory in New York City in 1932 was an explicit and widely appreciated effort to unite "regular Republicans, dissident Democrats, and Independent Socialists" against the corruption of the notorious "Tammany Hall" machine. "La Guardia entered City Hall at the head of a coalition comprising disparate elements," notes one political scientist. "Yet there could be no mistaking what was essential in his

mandate." A. Mann, *La Guardia Comes to Power, 1933* 124, 153 (1965). *See also* T. Kessner, *Fiorello La Guardia and the Making of Modern New York* 239-253 (1989). Again, we agree with the Eighth Circuit that fusion "informs voters rather than misleads them," and we share that court's doubts about the State's contention, as that court characterized it, that "multiple party nomination would confuse voters by giving them more information." Cert. Pet. App. 8-9.

CONCLUSION

The weight of scholarly evidence regarding the history of electoral fusion supports the contention of the Twin Cities Area New Party that a ban on fusion imposes heavy burdens on that party's rights, that the interests put forward by the State are unwarranted and invalid, and that those interests provide no basis for abridging the essential rights urged by the New Party. Anti-fusion laws were passed with partisan intent and a candid animus towards minor parties. The passage of these laws has contributed directly and indirectly to the decline in electoral competition and voter turnout which has marked electoral politics since 1896. Neither the experience of anti-fusion states before the 1890s, nor the experience of fusion states since the 1890s, justify the State's fears of political instability or voter confusion. Accordingly, this Court should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

DAVID HALPERIN
Counsel of Record
2027 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 328-2232

Counsel for *Amici Curiae*

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